UC Law Journal of Race and Economic Justice

Volume 22 | Number 1 Article 8

1-2025

"Prisoners of the Union": Emporium Capwell and the Decline of Concerted Activity against Racial Discrimination

Andrew Hull

Follow this and additional works at: https://repository.uclawsf.edu/hastings_race_poverty_law_journal

Part of the Law and Race Commons

Recommended Citation

Andrew Hull, *"Prisoners of the Union": Emporium Capwell and the Decline of Concerted Activity against Racial Discrimination*, 22 HASTINGS RACE & POVERTY L.J. 211 (2025).
Available at: https://repository.uclawsf.edu/hastings_race_poverty_law_journal/vol22/iss1/8

This Article is brought to you for free and open access by the Law Journals at UC Law SF Scholarship Repository. It has been accepted for inclusion in UC Law Journal of Race and Economic Justice by an authorized editor of UC Law SF Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

"Prisoners of the Union": Emporium Capwell and the Decline of Concerted Activity against Racial Discrimination

ANDREW HULL*

ABSTRACT

This paper tracks the development of judicial understanding of labor unions' status under Section 9 of the National Labor Relations Act as the "exclusive representative" of employees for the purposes of bargaining with the employer, focusing on the how the Supreme Court case Emporium Capwell v. Western Community Addition has led to a gradual restriction of the scope of protected concerted activity by workers suffering discrimination.

This ossification reveals how rigid, overly theoretical understanding of the law that is divorced from practical contexts often leads to reinforcing racial disparities in a capitalist mode of production. I further argue Emporium Capwell provides a rich common ground for radical legal theories, including both Marxist and Realist-descended theories such as Critical Race Theory (CRT) and the Law & Political Economy (LPE) movement. LPE's framework allows for CRT and Marxist theories to engage each other over the contradictions in post-war liberalism that Emporium Capwell laid bare. Specifically, CRT and Marxist analyses of Emporium Capwell can serve as a basis for introducing Cedric Robinson's idea of "racial capitalism" in a legal context. Derrick Bell's critique of liberal Warren Court-era civil rights discourse, when combined with Marxist critiques of labor unions in a capitalist mode of production, can show how non-realistic legal analysis shores up racial capitalism.

*Andrew Hull, MSt (Oxon), PhD (Northwestern) is a 3L JD Candidate at Emory University School of Law, Dean's Teaching Fellow, and Editor-in-Chief of the EMORY INTERNATIONAL LAW REVIEW.

TABLE OF CONTENTS

Introduction....212
Outline of Argument....217
I. Emporium Capwell....220
II. The Rot Begins: The NLRB and *Jubilee*....226
III. The Burials of *R.C. Can Co.* and *Rubber Rolls*: What Might Have Been?....231
IV. Ways to Think About What a CBA Is....235
V. 14 Penn Plaza as Culmination of Emporium Capwell....238
VI. Private Justice, Public Lawlessness....241
VII. Emporium Capwell to 14 Penn Plaza: Common Ground for Radical Legal Theories....245
VIII. When Bell Meets Robinson: Racial-Capital Realism....249
Conclusion....253

INTRODUCTION

The National Labor Relations Act (NLRA), while representing perhaps the greatest legislative achievement of the American labor movement and one that still steers labor organizing today,[1] was also a product of legislative horse-trading and capitulations to white supremacy.[2] This background of the NLRA is mainly referenced in the context of section §152(3), which excludes domestic and agricultural labor from the Act's protections.[3] The New Deal,

1. Joseph McCartin, *"As Long as There Survives": Contemplating the Wagner Act After Eighty Years*, 14 LABOR, May 1, 2017 at 21, 24, https://doi.org/10.1215/15476715-3790138 ("What was most remarkable about this half century of rumination over the Wagner Act was the degree to which the act remained the touchstone to which scholars, labor reformers, and trade unionists alike returned again and again as they came to terms with labor's growing crisis and attempted to frame strategies for labor's future. A quick review of this history makes clear just how tenacious this attachment to the act has been over the years.").

2. Juan Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 118-25 (2011), https://heinonline.org/HOL/P?h=hein.journals/ohslj72&i=97. The racist background of the §152(3) exclusion has been known for decades, *see*, *e.g.*, Risa Goluboff, THE LOST PROMISE OF CIVIL RIGHTS 29 (2007) ("Like many of the New Deal's economic protections, [the NLRA] excluded agricultural and domestic workers. Many of those workers were African American, so their exclusion marked a concession to southern white congressmen."); Ira Katznelson, When Affirmative Action Was White 59 (2005) ("It is not hard to see why southern members were so intensely concerned with [agricultural workers] [. . .] The status of subaltern black labor in agriculture – a structure that often came close to resembling nineteenth-century conditions under slavery – was a consistent concern for southern members in the 1930s [. . .]").

3. 49 Stat. 449 (1935) § 2(3), as amended, codified as 29 U.S.C.S. § 152(3) ("National Labor Relations Act") ("NLRA") ("Wagner Act"): "The term "employee" shall include any employee,

while still offering a number of benefits for Black workers,[4] also contained numerous exclusions,[5] and the legislative debates are riddled with racist articles.[6] The NLRA's exclusion of sectors with predominately Black workforces is but one example of the New Deal's accommodations for Jim Crow.

However, the NLRA has other provisions which, in application and judicial interpretation, have also had deleterious effects on the ability of Black workers to combat discrimination in the workplace. This article will focus on one provision in particular: §9(a), codified as 29 U.S.C.S. §159(a),

and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home* [. . .]" (emphasis added).

4. While the New Deal's constituent legislative acts did not include any provisions specifically meant to benefit Black Americans, early New Deal scholars still emphasized the benefits accrued to Black people, *see*, *e.g.*, Carl Degler, *Out of Our Past: The Forces That Shaped Modern America* (1959), 397 ("The Roosevelt administration did much for the Negro [. . .] When low-cost housing went up, Negroes got their share; Negro youths were welcome in the CCC and NYA just as whites were, though in the former the races were segregated [. . .] Even-handedly distributed federal relief funds were a gift from heaven to the black man, who was traditionally 'hired last and fired first"); many Black voters' first ballots ever cast were for Agricultural Adjustment Administration and NLRB elections. *Id.* Many of these benefits, and their effect on persuading Black Americans to vote for the Democratic Party, have been accepted by scholarly consensus, but other authors do seek to complicate the picture by examining the extent of Black exclusion and considering my deeply Black reactions to those failures. *See* Christin Marie Taylor, LABOR PAINS: NEW DEAL FICTIONS OF RACE, WORK, AND SEX IN THE SOUTH (2019).

5. Perea, *supra* note 2, at 104-117 (including exclusions, either textually or in application, against Black workers in The National Industrial Recovery Act, the National Recovery Act, the Agricultural Adjustment Administration, the Social Security Act, and the Fair Labor Standards Act." *See also* the legislative history of these acts, *eg. infra* note 6 for NIRA; for Social Security Act, *see Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means,* 74th Cong. 108, 598 (1935) (Exchange between Representatives Howard W. Smith of Virginia and Representative Thomas Jenkins of Ohio).

6. Raymond Wolters, NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY 145 (1970). The statement by J.F. Ames was a major proponent of the differential, describing Black workers as "subnormal," "unproductive," and having inferior intelligence to white workers. *National Industrial Recovery Administration, Hearing on Application for Exemption from Code of Fair Competition for the Textile Bag Industry in the United States*, 73rd Cong. 7 (1933) (statement of J. F. Ames, Selma Manufacturing Company) ("The figures given [on the intelligence of colored men] are taken from men who were four, five and even six generations from their native land, in which there has been no progress for centuries. *Contact with the superior white race, in all those generations, has not elevated the colored race beyond the position in relative intelligence established by the tests. If all the past years have failed to make any real impression in the status of their intelligence, can any legislative act take them and immediately advance their capabilities to be equal to those of the white man with whom they must compete in the race for employment? We think not* and because of this inherent irradicable element of incapability, any idea is futile that fails to recognize a difference does exist and will always exist, and that *a proper difference in wage rates must be applied to meet the inequality.*") (emphasis added).

which provides for a labor union to operate as the "exclusive representative" in bargaining with the employer for a designated group of workers:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, *shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment*: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect*: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.[7]

§159(a) appears facially neutral with respect to race. Indeed, the provision appears to provide some level of flexibility for workers to advocate for improvement of their labor conditions. However, as will be seen below, the history of jurisprudence around §159(a) is one of slowly restricting workers' capacity to bargain outside of the union's formal structure, including over instances of racial discrimination. The court's embrace of a rigid interpretation of §159(a) hinders the struggle for racial justice because it restricts the ability of racialized union workers to use every tool at their disposal to combat discrimination in their employment. Eliminating racial discrimination and promoting the collective strength of workers are both important public policy goals, but the Court's current interpretation of §159(a) subordinates the goals of anti-racism to the goals of unionism.

This article will focus on two major steps of §159(a)'s transformation into a weapon against civil rights. The first, and most significant, case is *Emporium Capwell Co. v. Western Addition Community Organization*, an 8-1 decision authored by Thurgood Marshall and dissented to by William O. Douglas.[8] In *Emporium Capwell*, the court upheld the termination of several Black union workers who picketed over racial discrimination claims that were slowly progressing through the grievance procedure.[9] This case signaled the closure of an alternate line of cases that understood union activity in a much less ossified light, one that comprehended the importance of workers' ability to advocate for conditions outside of the formal structures of a union-employer bargaining relationship.

7. 49 Stat. 449 (1935) § 9(a), as amended, codified as 29 U.S.C.S. § 159(a) (emphasis added).

8. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 73 (1975) (Douglas, J. dissenting).

9. *Id*. at 70-1.

In *Emporium Capwell*, Justice Douglas worried that the court's decision would make Black workers the "prisoners of the union," a tragedy for both racial equality and labor rights.[10] Douglas was partly right: *Emporium Capwell* laid the groundwork for Black workers to become the joint prisoners of *both the union and the arbitrator*. This leads to the second major case considered by this article, the 2009 case *14 Penn Plaza, LLC v. Pyett*, a 5-4 decision authored by Clarence Thomas.[11] *14 Penn Plaza* applied the (pre-NLRA) 1925 Federal Arbitration Act (FAA) to collective bargaining agreements – despite collective bargaining agreements (CBAs) being expressly governed by the NLRA and overseen by the National Labor Relations Board - with Thomas arguing that "nothing in the law suggests a distinction" between CBAs and agreements governed under the FAA.[12] The effect of this ruling was to allow union collective bargaining agreements to contain mandatory arbitration over civil rights abuses with no opportunity to achieve *de novo* review in the judiciary.

14 Penn Plaza, as almost immediately recognized, would have a deleterious effect on the ability for racial minorities and women workers to vindicate their civil rights.[13] This article will argue that Thomas' opinion in *14 Penn Plaza* was a culmination of the shortcomings present in Marshall's opinion in *Emporium Capwell*, especially the drastic over-emphasis on the "exclusive" nature of the relationship between the union and employer.[14] In

10. *Emporium Capwell Co.*, 420 U.S. at 73. ("The Court's opinion makes these Union members – and others similarly situated – prisoners of the Union. The law, I think, was designed to prevent that tragic consequence.").

11. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009).

12. *Id.* at 258.

13. *See* David Gregory and Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza V. Pyett*, CORNELL J. L. AND PUB. POL. 12 (2) (2009), 429, 458 at 450, 453-456, https://doi.org/10.2139/ssrn.1433877. (From 450: "The jurisprudential realpolitik of the *Pyett* decision is dramatically obvious. *Stark ideological and political warfare continues between the Court's core conservative majority and the liberal minority. This is thoroughly transparent and yields no surprises. The conservatives favor major institutional interests of employers and of unions, at workers' expense.* Concomitantly, the liberal minority is relatively more solicitous of workers, especially individuals who are sometimes shabbily treated by unions and employers or, at the very least, are generally more vulnerable and have fewer resources than these institutional counterparts.") (456: "*Under the Pyett regime, however, there is at least the potential that some of these salient positive attributes of labor arbitration could be quickly debilitated*. If the *Pyett*-era arbitration system becomes flooded with statutory-rights claimants accompanied by their personal attorneys suing the union and the employer with hybrid Section 301/breach of the union's duty of fair representation claims, all of whom are resolutely headed for the labor arbitration of their statutory claim as a matter of right, the institutional parties will amend their labor contracts to much more carefully contour *Pyett* issues.") (emphasis added); *but see* Salvatore, Paul, and Timothy Lockwood Kelly, *One Dozen Years of* Pyett *A Win for Unionized Workplace Dispute Resolution*, 36 (2) A.B.A. J. EMPL. LAB. L. 257 (2022), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v36/no-2/one-dozen-years-of-pyett-a-win-for-unionized-workplace-dispute-resolution.pdf.

14. Indeed, as will be seen below, *14 Penn Plaza* expressly cites *Emporium Capwell* in a crucial part of its opinion.

the wake of *14 Penn Plaza*, Black and other racially marginalized workers can be precluded from vindicating their Title VII rights in court or effectively organize against the employer, all because of the collective bargaining agreement.

After considering *Emporium Capwell* and its legal legacy in *14 Penn Plaza*, this article will end with some theoretical reflections on this line of cases. Specifically, the article will consider how *Emporium Capwell* is a case where Critical Legal Studies (CLS), Critical Race Theory (CRT), and Law & Political Economy (LPE) theorists can come to fruitful agreement with each other and draw from their shared ancestry of Legal Realism. *Emporium Capwell*'s ecumenical value to radical legal theorists is an example of a legal correlate to the phenomenon Cedric Robinson calls "racial capitalism."[15]

With *Emporium* Capwell as the background, we can even see how these theorists can reconcile with Marxist theorists (their traditional foils in radical theory). Consider that Marxist writers have argued that labor unions, despite their apparent short and medium-term benefits, still legally operate inside a framework shaped by the capitalist mode of production.[16] Meanwhile, critical race theorists have argued that American law is fundamentally formed by racism – especially anti-black racism – due to the foundational legacy of chattel slavery.[17]

There is a way to combine both ideas. Drawing on Derrick Bell's idea of "Racial Realism" and his critique of Warren Court era civil rights discourse,[18] I propose that *Emporium Capwell* is a valuable case for demonstrating the utility of combining these views into a theory of "racial-capital realism," reminiscent of Cedric Robinson's *Black Marxism*. This view proposes that an overly formalistic understanding of law divorced from material realities, especially the realities of being a racialized worker, leads to perpetuating racial inequality inside capitalist labor relations.

15. CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 37 (2000) ("In contradistinction to Marx's and Engels's expectations that bourgeois society would rationalize social relations and demystify social consciousness, the obverse occurred. *The development, organization, and expansion of capitalist society pursued essentially racial directions, so too did social ideology. As a material force, then, it could be expected that racialism would inevitably permeate the social structures emergent from capitalism.* I have used the term 'racial capitalism' to refer to this development and to the subsequent structure as a historical agency.") (emphasis added).

16. BARRY EIDLIN, *Labor Unions and Movements*, *in* THE OXFORD HANDBOOK OF KARL MARX 403 (Matt Vidal, Tony Smith, Tomás Rotta, & Paul Prew eds., 2019), https://doi.org/10.1093/oxfordhb/9780190695545.013.24 (accessed Feb. 22, 2024) ("Unions by their very existence affirm and reinforce capitalist class society. As organizations which primarily negotiate wages, benefits, and working conditions with employers, unions only exist in relation to capitalists. This makes them almost by definition reformist institutions, designed to mitigate and manage the employment relationship, not transform it.").

17. Darren Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1193-1196 (2004).

18. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 366 (1992).

Emporium Capwell represented the end of a more fluid understanding of "exclusive representation" of the union that allowed for concerted minority action to tackle racial discrimination. This alternate path is on display in 1960s US Courts of Appeals cases such as *R.C. Can*, *Rubber Rolls*, *Packinghouse Workers*, and *Western Addition Community Organization*. This article will also consider these cases and how their approach to labor organizing reflected a more realistic understanding of the union's role as exclusive representative. With the *Emporium Capwell* Court's restrictive understanding of exclusive representation, the struggles of non-white workers for equality were subsumed under the terms of the collective bargaining agreement, even if the rest of the union's rank-and-file supported the activities of the workers' activities. Arbitration and its ability to operate as a sort of "private government" that is nearly "lawless" increased alongside this. *14 Penn Plaza* represents a drastic subordination of workers' civil rights concerns to the agreement engendered between the employer and union.

However, Clarence Thomas in *14 Penn Plaza* could not have achieved this ruling without Thurgood Marshall in *Emporium Capwell*. This result seems highly ironic given how seemingly opposed these Justices are in jurisprudence, but this reliance can also be seen as evidence of both Derrick Bell's critique of Civil Rights Era jurisprudence and of Marxist critiques of labor organizing in a capitalist legal order. This dual vindication hints towards a mode of legal interpretation – racial-capital realism – that can grasp the continued impact of racial capitalism on the American legal order.

OUTLINE OF ARGUMENT

In Section 1, this paper will discuss the case *Emporium Capwell Co. v. Western Addition Community Organization*, the cornerstone case that allowed the Court to construct its opinion in *14 Penn Plaza*. After examining the facts behind *Emporium Capwell* and its procedural history, this essay will examine the majority opinion, authored by Justice Marshall, along with the dissent by Justice Douglas. This essay will consider how Marshall weighs dueling public policy goals and comes out in favor of union rights.

As will be seen in Section II, *Emporium Capwell* did not come out of thin air. Two years before *Emporium Capwell*, the NLRB in their case *Jubilee Manufacturing* had already developed an out of touch understanding of racial discrimination in the workplace: its origin, its effects, and how workers organize against it. The Board decided in *Jubilee* that racial discrimination is not an unfair labor practice, which the Board understood to mean an "inevitable" violation of workers' ability to collectively organize. Already in this case, we see a bifurcation between civil rights and union rights, with union rights taking precedence.

Section III illustrates it did not have to be this way. Before *Emporium Capwell* and *Jubilee*, Courts of Appeals were exploring an interpretation of

§159(a) that adopted a more capacious understanding of how workers can independently bargain with the employer, especially around racial discrimination. Two cases that are especially relevant here are *NLRB v. Rubber Rolls* (3d Cir. 1967) and *NLRB v. R. C. Can Co.* (9th Cir. 1964). These cases did not see a tension between independent organization by workers against racial discrimination and the collective bargaining position of the union. These cases were decided during the height of the Civil Rights Era and reflective of the national struggle over making racial equality a major public policy goal. The majority opinion in *Emporium Capwell* represented the closure of this line of interpretation, but Douglas's dissent represented the final expression of this interpretation. While defeated, this outcome was contingent and could have achieved ultimate vindication in *Emporium Capwell*.

The above sections were all about cases that slowly restricted the reading of §159(a) and made the collective bargaining agreement more controlling for how union workers may bargain with their employer. In Section IV, there will be a brief examination of how to think about collective bargaining agreements (CBAs). What are CBAs? What is the goal of a CBA? Is a CBA analogous to any form of contractual agreement? What will be seen is that American jurisprudence fundamentally sees the CBA as a trade contract, wherein the union functions as large hiring hall and the employer agrees that they will hire from that "hiring hall" and provide those hired with certain term of employment. With this jurisprudence, the objective of generally promoting individual worker welfare or pursuing some sort of collective benefit takes a backseat to facilitating the buying and selling of labor power. This understanding of unionization and collective bargaining is key to considering why §159(a) began to take on a more restricted reading. When worker welfare becomes subordinate to maintaining a trade relation between two organizations, the civil rights violations of individual workers will similarly become subordinate to facilitating this purchase of labor power.

In Section V, the strands examined in Sections I-IV come together with the examination of *14 Penn Plaza*. This case holds that a collective bargaining agreement may contain a mandatory pre-dispute arbitration clause that covers claims of racial discrimination. This case dissolved the distinction between collective bargaining agreements and other types of contracts by applying the Federal Arbitration Act (FAA) to CBAs made under the NLRA. As pointed out by Souter in his dissent, this represented a rejection of a distinction held by every Court of Appeals except the Fourth. Most fundamentally, this case held that an employee's individual civil rights claims can be foreclosed by a collectively bargained agreement. To justify this, Thomas relied on Marshall's reasoning in *Emporium Capwell* to embrace a strict reading of the union's status as the exclusive bargaining representative. Douglas's fear reaches its realization in this case. By failing to recognize the importance of providing both formal and informal methods

for fighting racial discrimination in the workplace and by an overly restrictive reading of the union's bargaining exclusivity, *Emporium Capwell* made it possible for the union to even control the worker's access to the courts and civil rights agencies (the one path Marshall clearly believed should stay open). However, the path to *14 Penn Plaza* had many forks in the road that could have led to greener pastures. If the NLRB had endorsed circuit court decisions that racial discrimination was an unfair labor practice, if *R.C. Can* and *Rubber Rolls*' reading of §159(a) had prevailed, if Marshall agreed with Douglas, Black workers would have found themselves in a markedly better legal landscape.

In Section VI, the promises and dangers of labor arbitration around civil rights issues will be considered. The problems of construing a CBA as mainly a trade agreement, and how this affects civil rights claims of workers, will be further discussed. While arbitration does present some benefits in terms of being cheaper and faster, it also can lead to a worker subjecting their civil rights to a lawless arbitrator who is afforded nearly total deference by the courts. This increased arbitration has given rise to a sort of privatized justice that can threaten to undermine public policy commitments to racial equality.

Sections VII and VIII conclude this paper by showing the theoretical richness of studying the road from *Emporium Capwell* to *14 Penn Plaza*. The evolution of §159(a), and how this corresponded to the rise and fall of the Civil Rights Era, provides fertile ground for various sorts of legal theorists. In particular, the development of §159(a) might allow a reconciliation between Realist-inspired legal theories and Marxist theories of law.

Starting from the Realist side in Section VII, Legal Realism and its descendants like CRT and LPE emphasize the semantic contingency of law and how this makes law subject to both structural racism and the unconscious racism of individual judges. In contrast, Marxist theories tend to downplay this semantic contingency and see law as a socially determined component of the superstructure that develops to reinforce the status of the ruling capitalist class. This perceived tension prevented much potential coalition building between these various camps over the decades. However, §159(a)'s development provides an instance where these camps can all have something to say to each other. CRT, especially with Bell's interest convergence theory, can provide an account of §159(a) that reckons with how socially determined law is in a racist capitalist society. In this way, CRT can build its half of a bridge to the Marxists.

Section VIII considers §159(a)'s development from the Marxist angle. Contrary to common perception, Marxist theories do not see law operating with an almost mechanistic determinativeness in favor of the ruling class. In reality, there is plenty of room for contingency and possibility for workers to use the law for their ends. These glimmers of alternate paths for §159(a) can be seen in Board and Circuit Court decisions during the 1960s and early 1970s. While the course of history came to favor an interpretation of §159(a)

that prized thinking of the union as a hiring hall with a monopoly on its members' labor power and the power to bargain away those workers' individual rights, it did not have to turn out this way. By adequately appreciating the role of the contingent in Marxian analysis of political-economic developments (including developments in "superstructural" elements such as law), Marxists can build their half of the bridge to the Realists.

What does this bridge look like when completed? This essay proposes that one Realist-inspired theoretical approach in particular – Law and Political Economy – can serve as a sort of interpretative "shell" that makes it possible to apply Cedric Robinson's theory of racial capitalism (described most prominently in Black Marxism) in a legal context while preserving many of the insights pioneered by Critical Race Theorists. This application of Robinson's theory to law gives rise to a "racial capital realism," a hybrid theory capable of understanding the fraught dynamic between race and capitalism in the law. On this account, law starts off interpretatively contingent and ambiguous, but over time these contingencies and ambiguities tend to be ironed out through a jurisprudence that becomes increasingly static and ossified. This development will tend to occur in ways that reify both capitalist labor relations *and* racial inequality. Bell, Britton-Purdy, Marx, Llewellyn, and Robinson can all come together, even if the occasion is to collectively lament the evolution of §159(a) of the NLRA.

I. EMPORIUM CAPWELL

Emporium Capwell represents the Supreme Court's embrace of an overly formalistic understanding of labor organizing and bargaining. The Court's composition on ruling was all the more remarkable as it featured a showdown between the Court's two most prominent liberals; Thurgood Marshall authored the opinion upholding the termination of several Black workers, while William O. Douglas dissented that the union failed in its duty of fair representation to the workers and voting to reverse their terminations.

The facts of *Emporium Capwell* are dramatic and deserve a proper recounting. The case concerned the actions of several unionized workers at the Emporium Capwell Co. department store in San Francisco.[19] The department store was a member of the San Francisco Retailer's Council, and the Council had a collective bargaining agreement between all members of the council and the Department Store Employees Union.[20] The union represented the workers operating in the stocking and marking areas of the company.[21] The bargaining agreement had standard provisions: a recognition

19. *Emporium Capwell Co.,* 420 U.S. at 52.
20. *Id.* at 52-53.
21. *Emporium Capwell Co.*, 420 U.S. at 52.

of the Department Store Employees as the sole collective-bargaining agent for all the covered employees, a no-strike and no lockout clause, arbitration procedures, and a prohibition of discrimination on the basis of race (among other protected identities).[22]

On April 3, 1968, several employees met with the union's secretary-treasurer to present several grievances about instances of racial discrimination by the employer. In response, Emporium Capwell said it would "look into the matter."[23] Five months went by without a response by the employer.[24] In order to pressure the company to move on the complaints, the union held a meeting in September attended by union officials, company employees, and representatives from antipoverty services and California's fair employment agency.[25] At this meeting the union endorsed the employee's claims of racial discrimination and demanded the union and management form an "adjustment board" to hear the grievances.[26]

However, several employees argued these proceedings under the CBA were inadequate to address the grievance as the hearings of the adjustment board would only consider the claims individually.[27] Instead, the workers argued that the board should consider the claims collectively as the grievances were about systemic discrimination, not merely isolated incidents. They further argued that picketing or some other sort of industrial action was necessary to make the employer take the issue seriously. Nevertheless, the secretary-treasurer believed otherwise, stating that the CBA bound the union to proceed on an individual basis and that the individual processing of grievances would be most helpful for fighting discrimination overall.[28]

A month later, the adjustment board was convened to consider the grievances,[29] but the grieving employees refused to provide testimony for a procedure they considered fatally flawed.[30] Instead, the grieving employees read a statement reiterating their objection to the individual processing of systemic discrimination and demanding a meeting with Emporium Capwell's president before walking out of the meeting.[31] The workers' attempts to meet with the president were rebuffed, and they were told to meet with the personnel director only.[32] In response, the workers held a press conference where they repeated their desire to meet with the employer and announced their plan to picket and boycott Emporium Capwell over systemic racial

22. *Id*. at 53.
23. *Id*. at 54.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Emporium Capwell Co.*, 420 U.S. at 54.
29. *Id*. at 55.
30. *Id*.
31. *Id*.
32. *Id*.

discrimination in their workplace.[33] The picketing began on November 2, with the grieving employees picketing and distributing handbills that advocated a boycott of Emporium Capwell.[34] The treasurer-secretary of the union tried again to persuade the workers to stop picketing, explaining his view that the grievance process was best equipped to handle the complaints, and cautioned them that the employer may try to fire them.[35] After a written warning from the employer went unheeded, the workers were fired.

Shortly afterwards, Western Addition Community Organization filed an unfair labor practice charge with the NLRB on behalf of the employees.[36] The Board's General Counsel found sufficient evidence to issue a formal complaint that Emporium Capwell had retaliated against the employees for concerted and protected activity.[37] However, the NLRB's trial examiner disagreed. The examiner conceded that the employees "believed in good faith that [Emporium Capwell] was discriminating against minority employees, and that they had resorted to concerted activity on the basis of that belief."[38] Nevertheless, the examiner ultimately held the concerted activity was not protected under the NLRA.[39] The Board adopted the trial examiner's conclusion.[40] Interestingly, the Board held that the workers' conduct was not protected because their activity "was no mere presentation of a grievance but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees."[41]

On appeal, the workers initially had better luck as the Court of Appeals for the DC Circuit reversed and remanded the case on the grounds that activity directed against racial discrimination enjoyed a "unique status," citing their previous case *United Packing House Workers v. NLRB*, which held racial discrimination was inherently an unfair labor practice,[42] along with Title VII of the 1964 Civil Rights Act.[43]

However, the workers ultimately lost the war in the Supreme Court, which held by an 8-1 decision that the employees' actions, while against systemic racial discrimination, were not protected under the National Labor Relations Act or Title VII. The Court's analysis of these workers' §159(a)

33. *Id*.
34. *Id*.
35. *Id.* at 55-56.
36. *Id.* at 56.
37. *Emporium Capwell Co.*, 420 U.S. at 56.
38. *Id*.
39. *Id*.
40. Emporium, 192 N.L.R.B. 173 (1971).
41. *Id*. at 185 (quoted in *Emporium Capwell Co.*, 420 U.S. at 56).
42. W. Addition Cmty. Org. v. N.L.R.B., 485 F.2d 917, 927 (DC Cir. 1973) (citing United Packinghouse Workers Union v. N.L.R.B., 416 F.2d 1126, *cert. denied*, Farmer's Co-op Compress v. United Packinghouse etc., 396 U.S. 903 (1969)) (cited in *Emporium Capwell Co.*, 420 U.S. at 59).
43. Civil Rights Act of 1964, Title VII, § 701, 78 Stat. 253 (1964), amended by 42 U. S. C. § 2000e et seq. (2024).

rights was to note that "central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule," and acknowledging this may lead to dissatisfaction by a minority group of workers in some cases.[44] For support, Marshall cites Congressional testimony and several other cases including *J.I. Case v. NLRB*, which shall be discussed more below.[45] Marshall cites a strikingly different case in support of this majoritarian principle, *NLRB v. Allis-Chalmers Mfg Co.*[46] In this case, workers sued the union for fining them as punishment for crossing the picket line after the union had voted by a two-thirds majority to begin a strike, an act that inherently diminished the effectiveness of the union's action. The court cited from the *Allis-Chalmers* opinion that the premise of "pooling workers' economic strength and acting through a labor organization freely chosen by the majority" was the most effective approach for organizing, but that in turn "[this] policy therefore extinguishes the individual employee's power to order his own relations with his employer [. . .]."[47]

The key part of the ruling occurred when Marshall acknowledged "national labor policy embodies the principles of nondiscrimination as a matter of national policy," citing the case *Alexander v. Gardner-Denver Co*.[48] However, this general principle from *Gardner-Denver Co.* was of no help to the workers because Marshall doubted separate bargaining was necessary.[49] In fact, "the [workers'] proposed remedy might have just the opposite effect. The [CBA] prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred."[50] If so, then an arbitrator's award could be enforced in court. What if the arbitrator denied the complaint? In a way that becomes crucial for understanding the significance of *14 Penn* Plaza, Marshall again cited *Alexander v. Gardner Denver Co*. to support his

44. *Emporium Capwell Co.*, 420 U.S. at 62.

45. *Id.* ("In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. Vaca v. Sipes, 386 U.S. 171, 182 (1967); J. I. Case Co. v. NLRB, 321 U.S. 332, 338-339 (1944); H. R. Rep. No. 972, 74th Cong., 1st Sess., 18 (1935). As a result, "[the] complete satisfaction of all who are represented is hardly to be expected." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).").

46. NLRB v. Allis-Chalmers Mfg Co., 388 U.S. 175, 180 (1967), cited by *Emporium Capwell Co.* 420 U.S. at 63.

47. *Id.*

48. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), cited by *Emporium Capwell Co.*, 420 U.S at 66.

49. *Id*.

50. *Id.* at 66-67 (Marshall cites in a footnote testimony from the Secretary-Treasurer of the union that The Union had been "prepared to go into arbitration" to "enforce its position, but was advised by its attorney that it would be difficult to do so without the dissident members' testimony.").

contention that the grieving workers can litigate their Title VII claims in federal courts.[51]

What about the workers' claims that the arbitration was done individually when only a collective arbitration sufficiently addresses their grievances? Marshall claimed that there is no reason to believe "that the processing of grievances is inherently limited to the correction of individual cases of discrimination."[52] However, Marshall punted when it came to defending this position:

> Quite apart from the essentially contractual question of whether the Union could grieve against a "pattern or practice" it deems inconsistent with the nondiscrimination clause of the contract, one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions.[53]

This is a surprisingly weak explanation, because the answer to the contractual question would reveal whether the workers were able to grieve about systemic discrimination. If the CBA's language did not allow for a collective style grievance over systemic discrimination, then he would be forced to squarely reckon the tension in labor law over whether racial equality or the exclusivity of the union through the bargaining agreement wins out. If racial equality wins out, then perhaps the workers would be able to make a demand under the §159(a)'s proviso for "adjustment." As Douglas points out, they could perhaps additionally sue the union for failing in their duty of fair representation by adopting a woefully inadequate process.[54]

After this punt, Marshall tries to play defense by writing, "Even if in actual bargaining the various groups did not perceive their interests as divergent and further subdivide themselves, the employer would be bound to bargain with them in a field largely pre-empted by the current collective-bargaining agreement with the elected bargaining representative."[55] This is true, but Marshall uses the fact that one of the demands would possibly pose a conflict with a provision of the collective bargaining to claim that, in fact, the union and workers *must* be at cross purposes. Specifically, the demands seem to have "included the transfer of some minority employees to sales areas in which higher commissions were paid."[56] This would cause a conflict, Marshall explains, because the CBA "provided that no employee would be transferred from a higher-paying to a lower-paying classification except by

51. *Id*. at 66 n. 18.
52. *Id*.
53. *Id*.
54. *Emporium Capwell Co.*, 420 U.S. at 74-75 (Douglas, J., dissenting).
55. *Emporium Capwell Co.*, 420 U.S. at 68.
56. *Id*.

consent or in the course of a layoff."[57] It seems Marshall's unstated assumption is that the employer would have to move some other (likely non-Black) workers to lower-paying positions to compensate. Thus, Marshall concludes, even if the union and group of workers agree, the CBA short-circuits any such actions as being against the union's formally stated position.

In his dissent, Douglas' most formidable argument comes from his reliance on *New Negro Alliance v. Sanitary Grocery Co.*'s holding that eliminating racial discrimination against workers "is quite as important" as equity in terms of employment for a labor union.[58] Douglas additionally cites a decision by the Equal Employment Opportunity Commission that, while a collective bargaining agreement may have a no-strike clause, employees could still picket over racial discrimination because they have a statutory rights under Title VII to oppose racial discrimination in the workplace.[59]

Douglas described Marshall's opinion as leading to a tragic result between the racially discriminated and workers committed to democratic control over their workplace. In truth, everything about this case is a tragedy, and Douglas's and Marshall's disagreement neatly encapsulates the fault-lines of egalitarian liberalism in a nation built on white supremacy.[60] As Schiller rightly noted in his book *Forging Rivals: Race, Class, Law, And The Collapse Of Postwar Liberalism*, we should understand Marshall's majority opinion as one coming from a deeply principled place. "Anyone familiar with Marshall's background," Schiller writes, "could not help but understand that he did not arrive at this position out of a lack of sympathy for the victims of racial discrimination."[61] What motivated Marshall, however, was a devotion to a "liberal, integrationist vision of the struggle for African American equality in which black workers would achieve equality by embracing

57. *Id*.

58. New Negro All. v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938) (cited in *Emporium Capwell Co.*, 420 U.S. at 74-75 (Douglas, J., dissenting)).

59. CCH EEOC Decision No. 71-1804, para. 6264 (1973), cited in *Emporium Capwell Co.*, 420 U.S. at 74. The EEOC held that in spite of a collective agreement involving a "no strike" clause an employee might picket the plant for discrimination against blacks. The Commission explained: "An employee has a statutory right under Title VII to oppose, without retaliation, any unlawful employment practices of his employer. We believe this right cannot be abolished or diminished by a collective bargaining agreement. The protection which Title VII affords to Charging Party No. 1's conduct may be analogized to the protection the National Labor Relations Act affords employees who picket in protest against unfair labor practices committed by their employer, although there exists a valid collective bargaining agreement containing a no-strike clause."

60. *See also* Reuell E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERK. J. EMPL. LAB. L. 129, 130 (2004) ("The conflict among the Emporium, its African-American employees, and, as we shall see, Department Store Employees' Union, Local 1100, was a singularly significant, or at least emblematic, event in the history of post-war liberalism. The dispute and the trail of litigation it generated illustrate the crisis that liberalism found itself mired in at the end of the 1960s as it sought to accommodate its constituents' disparate visions of economic equality and social fairness.").

61. REUELL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM, 216 (2015).

industrial pluralism."[62] The workers involved in *Emporium Capwell* argued that their systemic discrimination outstripped the grievance and arbitration procedures made available by the union, but this plea for exceptional treatment for exceptional discrimination ran up against Marshall's desire for integration. To Marshall, a union that is genuinely integrated would treat Black workers just like any other workers, so a move by Black workers to directly approach the employer should be treated like any minority unit of workers approaching the employer: a potential threat to the majoritarian governance of the union.

Interestingly, the Federal Arbitration Act (FAA) plays no role in the decision of this case, though the case is primarily about arbitrating over racial discrimination. As will be seen, this is one way in which *14 Penn Plaza* builds upon *Emporium Capwell*. The Court in *14 Penn Plaza* takes *Emporium Capwell*'s restrictive reading of §159(a) and sees it as entirely compatible with the FAA. Because the Court, along with the NLRB, have by this point denied racial discrimination is an unfair labor practice under Section 8, arbitration over racial discrimination presents no tension with the purposes of the NLRA. According to the Court's and Board's readings, the only public policy goal of the NLRA is to support majoritarian-governed unions, not necessarily anti-racist unions.

As shall be seen, while Marshall's opinion was driven by liberal egalitarian principles for which he risked his life, these principles ironically led to a complete subsumption of Black workers' civil rights to the collective bargaining agreement. Thomas' opinion in *14 Penn* took the idea of majoritarian control of workers' rights in the workplace as a sign of racial integration to the extreme: like other labor disputes over matters such as pay and seniority, civil rights in the workplace should not be considered special and so should be subject to the same sort of arbitration as these other matters, with all the shortcomings that accompany arbitration.

II. THE ROT BEGINS: THE NLRB AND *JUBILEE*

As already seen above, at least one portion of the NLRA—§152(3) – can appear to be facially neutral with respect to race. Excluding whole classes of workers due to just their occupation (a mutable quality) would appear on its surface to be racially neutral. However, due to reasons of both the racial and political economy of the United States, these exclusions overwhelmingly hurt Black workers. Other portions of the New Deal were much more blatant with their discrimination against Black workers,[63] but legislative history

62. *Id.*

63. Perea, *supra* note 5.

bears out the impression this seemingly neutral policy was created out of a compromise with the segregationist South.[64]

However, the NLRA still brought immense benefits to other Black workers, and Black workers continue to be the most unionized of any racial group today.[65] The NLRA's inclusions and exclusions of Black workers can almost be seen as emblematic of the promises and shortcomings of American liberalism. On the one hand, there is a strong disdain for outright discrimination and in favor of a broad egalitarianism, not only between races but between classes. On the other hand, there is often a queasiness regarding how the distinctions of race and class interact with each other and a policy that may be focused on one distinction ends up neglecting (or even reinforcing) another distinction. The next section is another instance of this dynamic playing out, when the NLRB ruled in their decision *Jubilee Manufacturing* that racial discrimination is not an unfair labor practice and affirmed that the NLRA did not manifest a public policy against racism in the workplace.

The question of whether the NLRA manifests a public policy against racial discrimination relates to §159(a) because both involve a question of how exclusive is "exclusive." *Emporium Capwell* strictly construes the exclusivity of the bargaining relationship, but what about the fact that the statute seems to still allow for some employee bargaining outside of the union, including around racial discrimination?[66] There seems to be some room for workers to engage in protected activity under the NLRA when they protest discriminatory practices outside the four corners of the CBA. The NLRB, a year after *Emporium Capwell* was decided, held that employers commit an unfair labor practice by discharging employees who file with state or federal agencies to allege discrimination.[67] Relatedly, it is also an unfair labor practice to terminate employees for seeking assistance from other employees on filing discrimination claims,[68] or for asking an employee to

64. Perea, *supra* note 2.

65. Heidi Shierholz, Margaret Poydock, and Celine McNicholas, *Unionization increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19, 2023), https://www.epi.org/publication/unionization-2022/.

66. 29 U.S.C.S. § 159(a) (Designates the union as the exclusive bargainer with the employer, "[p]rovided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.").

67. King Soopers, Inc., 222 N.L.R.B. 1011 (1976) (collective bargaining agreement contained a no-discrimination clause); Advance Carbon Prods., 198 N.L.R.B. 741 (1972); *see* Frank Briscoe, Inc. v. N.L.R.B., 637 F.2d 946 (3d Cir. 1981).

68. Fresh & Easy Neighborhood Mkt., 361 N.L.R.B 151 (2014); *see also* Yellow Freight Systems, 297 N.L.R.B. 322 (1989), aff'd, 930 F.2d 316 (3d Cir. 1991) (employer violated NLRA by discharging employee who assisted female employe in filing sexual harassment charge with EEOC, upheld even though arbitrator determined they were fired for cause); *see also* THE

serve as a witness in a discrimination hearing.[69] However, as the treatise *The Developing Labor Law* emphasizes, *Emporium Capwell* is an "important caveat" to the aforementioned allowances.[70] The above cases were concerned with concerted activity independent of the union where employees availed themselves of legislatively provided avenues for dealing with discrimination or helping others use these avenues.[71] *Emporium Capwell* dealt with concerted activity independent of the union designed to place pressure on the employer during a grievance over racial discrimination. Thus, the formal outlets for confronting racism were preserved. Workers were able to alleviate the workplace discrimination they face through these channels, so long as their discrimination fit into the current jurisprudence, one that in the mid-1970s (the time all these cases were decided) was coming down from its Civil Rights Era high and settling into a more static and restrictive form.

In the landmark NLRB decision *Jubilee Manufacturing*, the NLRA itself does not ban any sort of employer discrimination based on protected identities. Instead, what is required is evidence of a "nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act."[72] This is a direct rejection of the DC Circuit case *Packinghouse Workers (Farmers Cooperative Compress) v. NLRB*, which held that racial discrimination inherently impaired a worker's §7 rights.[73] The DC Circuit's explanation for its holding and the NLRB's rejection of it bears repeating as they are good examples of how an ossified legal reasoning that obtusely focuses on text often leads to adverse rulings for minority workers. The Court in *Packinghouse Workers* explained that racial discrimination is an unfair labor practice because:

> (1) racial discrimination sets up an unjustified clash of interests between groups of workers *which tends to reduce the likelihood*

DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT Ch. 6, §§ III.B.5.–7 (John Higgins, ed. 2022) (hereinafter "DEVELOPING LABOR LAW").

69. Holling Press, 343 N.L.R.B. 301 (2004).

70. DEVELOPING LABOR LAW, *supra* note 68.

71. As seen by *14 Penn Plaza*, however, even these avenues could be foreclosed by the CBA's arbitration provisions. The Court in *Emporium Capwell* may have intended the workers to have reliable access to these official means of fighting discrimination, but that intention was lost on the Court in *14 Penn Plaza*.

72. Jubilee Mfg. Co., 202 N.L.R.B. 272, 272-73 (1973) ("[I]n our view, discrimination based on race, color, religion, sex, or national origin, standing alone, which is all that is alleged herein, is not 'inherently destructive' of employees' Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the Act. There must be actual evidence, as opposed to speculation, of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act").

73. *Id.* ("With all due respect to the [D.C. Circuit] court, we are unable to agree with this legal conclusion."); Packinghouse Workers (Farmers Cooperative Compress) v. N.L.R.B., 416 F.2d 1126, 1135 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969).

> *and the effectiveness* of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. [74]

In contrast, the Board acknowledged employer discrimination may pit racial groups against each other, but they said this result "is by no means inevitable." Instead, the discrimination could have a galvanizing and unifying effect on racial groups.[75] Because of these contingencies, the Board held racial discrimination is not an unfair labor practice.

First, the NLRB's rejection is not responsive to the Court's argument. Nowhere does the court say the creation of factions is "inevitable." The court instead characterizes these effects in terms of likelihoods. However, the Board's reasoning is even more misguided than that. In rejecting the idea that discrimination can lead to worker alienation that depresses their willingness to exert their §7 rights, the Board's reasoning proves too much. If the connection between an employer action and hinderance of §7 rights must be "inevitable," then exceedingly few actions by an employer against workers would count as unfair labor practices. It is true that employer retaliation against a union could well intimidate workers from joining the union, but it could also serve as highly effective proof of the union's claims about the employer. "Agitation," wherein workers commiserate over their working conditions and their employer's behavior, is an essential aspect of union organizing conversations as it communicates to other workers that they are not isolated in their dissatisfaction and that many other feels similarly. Potential unfair labor practices by the employer make for prime agitation fodder.

Indeed, almost any unfair labor practice by the employer could be turned into an effective piece of agitation: firing a worker for organizing can be turned into proof the employer is scared of unions because of what they can achieve for workers; offering pay increases for voting against a union can be described as a straightforward bribe or shameless pandering; setting up an employer-dominated "company union" shows the employer is insulting workers' intelligence by proffering a sham route for employee input that is obviously toothless in practice. The list goes on, and that proves catastrophic for the NLRB's jurisprudence around unfair labor practices. Labor organizing is fraught with contingency, and it is dependent on the dedication and effectiveness of organizing workers whether an employer's action becomes the death knell for a union or the spark for its flourishment. This ever-existing contingency, however, seems completely lost on the Board. As

74. *Packinghouse Workers,* 416 F.2d at 1135.
75. *Jubilee Mfg. Co.*, 202 N.L.R.B. at 272-73.

seen with *Emporium Capwell*, it appears to have eluded the Supreme Court as well.

Finally, it is worthwhile to note that the NLRB justifies its decision with reference to "the increased militancy of minority groups today."[76] The NLRB issued its *Jubilee* decision in 1973, just as the Civil Rights Era was ending and groups such as the Black Panthers and other radical organizations were rising. It appears the Board is implying that racial discrimination is not an unfair labor practice because, after decades of struggle, Black workers have started to effectively respond to their experiences of racial discrimination. To adopt language from Ginsburg's dissent in *Shelby County v. Holder*, the Board is like somebody who, having just opened an umbrella, concludes it is no longer raining because his hair is no longer getting wet.[77] The strength of a reaction to some harm is simultaneously used as evidence to downplay the severity of the harm.

The NLRB's decision in *Jubilee* put to rest a possibly anti-racist reading of the NLRA's protections by adopting an overly formalistic and simplistic understanding of how racial discrimination can become an unfair labor practice. Unfortunately, this would seem to be in keeping with what comes out of the legislative history of the Wagner Act. Southern members of Congress knew some Black workers would benefit, but this was acceptable to them because the unionized Black workers would mostly be outside the South. What mattered was their ability to continue excluding Black workers in this state. They did not read the NLRA as presenting any sort of challenge to the basic political economy of Jim Crow, and nothing in the record suggests more progressive members read it as such either.

However, legislative history is not the ultimate authority, and this is true of many laws that have far-reaching impacts despite signs of a more limited intention. For example, the Fourteenth Amendment remains the constitutional bulwark upon which federal anti-discrimination law is built, but the legislative history shows it was also riddled with compromises done to win the votes of racist members of Congress. Even if some of the drafters of the Fourteenth Amendment had more limited intentions for the Amendment, that does not mean the statute can only be read with that limited intention. This is true of the NLRA in other contexts too, such as the unionization of non-profit universities.[78]

76. *Jubilee Mfg. Co.*, 202 N.L.R.B. at 272-273.

77. Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J. dissenting).

78. *See* 93 Cong. Daily Record 5129, May 12, 1947; 2 Legislative History of the Labor Mgmt Relations Act, 1947, 1464. While the Taft-Hartley Act excluded non-profit hospitals from unionization, the silence about universities has been read in two ways by the Board. The original reading can be found in Trustees of Columbia University in the City of New York, 97 N.L.R.B. 424 (1951) ("Columbia"). The Board in Columbia especially relied on a conference report that said the Board can only extend its jurisdiction to other non-profit organizations in "exceptional" circumstances. *See* Columbia at 427, quoting 1 Legislative History of the Labor Management Relations Act, 1947, 505, 536. However, in *Cornell University & Ass'n of Cornell Employees*, 183

While members of Congress did not think of tackling racism through unionization, the statute's definitions are notoriously broad in scope, allowing the NLRB to fashion its own large and complex jurisprudence. Perhaps the statute's terms are broad enough to encompass anti-racist goals? The NLRB seems to have rejected that prospect in *Jubilee*, but it was shown above how poorly the Board argued for its conclusion. Further, there are other places where the NLRA can be read in a way that advance anti-racist struggle, and some Courts of Appeals have even supported these readings. Specifically, there is a reading of §159(a) that recognizes the racial realities of the American workplace and provides ample space for workers to independently organize against racial discrimination. The major cases that promoted this reasoning will be considered in the next section.

III. THE BURIALS OF *R.C. CAN CO.* AND *RUBBER ROLLS*: WHAT MIGHT HAVE BEEN?

The Court in *Emporium* took a strict understanding of a union's role as exclusive representative. Did it have to turn out this way? No, and several cases in the 1960s give us a hint of how a more dynamic and pragmatic understanding of a union's relationship with the employer that preserved the ability could have originated. I will focus most of all on *NLRB v. Rubber Rolls, Inc.*.[79]

In *Rubber Rolls*, Frederick J. Anderson, an organizer with the International Rubber Union, was critical of what he perceived as a slow and protracted contract negotiation process that made few gains.[80] There was also evidence that he was advocating for a strike.[81] During negotiations, the employer made remarks about how Anderson was a "troublemaker" and asked what the Rubber Union's reaction would be if he were fired.[82] The Third Circuit eventually found for Anderson and enforced the NLRB's order. Ultimately, this case was found on the narrower ground that, because of the negotiation table discussions and open threats by Anderson's boss that he was "on his way out" if he continued his union activities, Anderson's discharge was pretextual.[83]

N.L.R.B. 329, (1970) ("Cornell") the board rejected this ruling, reasoning that legislative silence on universities does not exclude the Board from them, a single conference report about non-profits in general notwithstanding. While faculty unionization has been seriously curtailed by *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), the Cornell Board's stance on silence in the legislative history has lasted.

79. N.L.R.B. v. Rubber Rolls, Inc., 388 F.2d 71 (3d Cir. 1967); *see also* N.L.R.B. v. R. C. Can Co., 328 F.2d. 974 (5th Cir. 1964).

80. *Id*. at 72.

81. *Id.*

82. *Id*.

83. *Id.* at 74 ("We need not decide this question, however, because the record supports the Board's order without regard to Anderson's most recent activity regarding a strike. The Board

However, *Rubber Rolls* includes a significant piece of *dicta* which exhibited a surprisingly realistic and pragmatic understanding of union negotiations. The court considered whether Anderson was advocating for a "wildcat strike" (a strike done without official approval by the union), and noted a wildcat strike raises the "fundamental" problem of the "incompatible policies of conferring on the collective bargaining agent selected by a majority of the employees the exclusive authority to speak for all of them and of permitting employees the right to individual expression over matters affecting their conditions of employment."[84] This part of the *dicta* was not especially controversial by itself, as courts and legislators both admitted that democratic control would not satisfy all workers. However, the court in *Rubber Rolls* continues and gives the following, tactically shrewd observation:

> There enters into this also the realization that there is a practical advantage to a bargaining agent in extreme demands by individual employees which may aid its more moderate position, and a distinction has been drawn by some authorities between conduct of an employee which is in antagonism rather than in aid of the bargaining agent's negotiation.[85]

When it comes to negotiations, a union has an interest in presenting itself as being willing to make a deal. Current labor law has long been broadly tolerant of bargaining impasses between the employer and union, with both the courts and NLRB rightly observing that impasses can easily arise from sincerely and passionately held differences.[86] It even allows for the union to utilize certain economic weapons, including on-job industrial actions, in order to pressure the negotiations through an impasse.[87] However, it is legally crucial that the record suggests the union's demand for negotiation (or the employer's rejection of an offer) be made in good faith, prolonged negotiation impasses notwithstanding.[88]

Obviously, one of the best ways to demonstrate this good faith is by positive statements by the union itself. However, that good faith can also be

adopted the trial examiner's finding that Anderson was discharged because of his union activities, both past and present . . . . The evidence fully supports this finding that one of the company's motives for discharging Anderson was his union activity prior to the most recent strike event.") (internal quotations omitted) (ellipses in original).

84. *Rubber Rolls, Inc.*, 388 F.2d at 73.

85. *Id*. at 73.

86. *E.g.* N.L.R.B. v. A-1 King Size Sandwiches, Inc., 732 F.2d 872 (11th Cir. 1984) (holding union and employer have no compulsion to reach agreement, but both employer and employee must negotiate in good faith).

87. N.L.R.B. v. Ins. Agents' Int'l Union, 361 U.S. 477 (1960).

88. N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956) (holding employer refusal to substantiate any reason for rejection of pay increase request can support a charge of bargaining in bad faith).

established in relief, meaning it can be shown by demonstrating a desire to establish a "reasonable" collective agreement over the protests of other "factions." The union, by its very disagreement with some of its members, can bolster its own credibility at the bargaining table. Moreover, while the other factions may protest a particular provision of the contract, the faction is still committed to the same broad goal of establishing a collective bargaining agreement that benefits workers in their conditions and pay. The Third Circuit appeared aware of why such a gambit may be tactically valuable. Indeed, the court's final *dicta* underscores the way in which Anderson's independent actions, while done outside the official sanction of the union's governance, were still done with an eye towards advancing the union's goal of improving workers' conditions.[89] Anderson's advocacy of a strike was done in the context of "assist[ing] the negotiations for which approval had already been given by the union."[90] This activity had the goal of "mutual aid and protection of workers" (to quote NLRA §158) by bolstering the negotiation position of workers' exclusive representatives.

In the graveyard of labor law, we find a valuable insight about majoritarian labor governance: the democratic foundation of a union's legitimacy and legal right to exclusive representation will not satisfy all, but that does not mean a disgruntled minority should be precluded from all forms of independent concerted activity. Far from undermining the union's role of exclusive representative, the independent concerted activity may bolster the union's standing with the employer. The Third Circuit in *Rubber Rolls* was aware of that reality of labor organizing in a way the Supreme Court in *Emporium Capwell* was not.[91]

Both *R.C. Cans* and *Rubber Rolls* are examples of the federal judiciary rising above its overly restrictive understanding of the union as the "exclusive" representative under the NLRA. Both cases keenly recognize how labor activity can, and sometimes should, proceed outside the formal bargaining arrangement, and this idea can be consistent with the union's role as exclusive representative of the member employees. Finally, eight years later, this same observation proved dispositive in the DC Circuit court's decision *Western Addition Community Organization v. NLRB*, the decision reversed by the Supreme Court in *Emporium Capwell*. The appeals court found:

> [It is] significant that the Union and the [workers] were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment. There was no disruption of orderly

89. *Rubber Rolls, Inc.*, 388 F.2d at 74.

90. *Id.*

91. Justice Douglas' statement in his dissent is the major exception with his claim that the *Emporium Capwell* court had made union members "prisoners of the union." *Emporium Capwell*, 420 U.S. at 73 (Douglas, J., dissenting).

> collective bargaining in the sense that minority of employees were not attempting here to speak for the majority as in the case where a minority group engages in a "wildcat" strike during company-union negotiations in an attempt to express a rejection of a company offer.[92]

Why are *R.C. Cans* and *Rubber Rolls* six feet deep in a potter's field? They were buried by *Tanner*, the Ninth Circuit case that cites and criticizes both cases.[93] The court in *Tanner* rejected the NLRB's request that they follow their earlier decision in *R.C. Cans.*[94] The court correctly glossed the *R.C. Can* decision to hold that "because the strikers supported the union, the employer did not have to choose between conflicting demands of the union and the employee group."[95] This is an extension of *R.C. Can*'s primary holding that employees without official approval by the union may still engage in concerted activity protected under Section 7, so long as that activity does not oppose the union's goals.[96]

However, the Ninth Circuit ultimately rejected this line of reasoning.[97] Instead, the court reached across decades and across circuits to embrace the 1944 Fourth Circuit case *NLRB v. Draper Corp*.[98] In *Draper*, a collective bargaining agreement between the employer and union had expired. To spur the creation of a new CBA that was advantageous to the union, a number of

92. W. Addition Cmty. Org. v. NLRB, 485 F.2d 917, 930 (D.C. Cir. 1973), *rev'd*, *Emporium Capwell*, 420 U.S. 50 (1975), *vacated*, W. Addition Cmty. Org. v. NLRB, 512 F.2d 992 (D.C. Cir. 1975) (citing N.L.R.B. v. Sunbeam Lighting Co., 318 F.2d 661 (7th Circ. 1963)) (emphasis in original).

93. N.L.R.B. v. Tanner Motor Livery, Ltd., 419 F.2d. 216 (9th Cir. 1969) ("Tanner").

94. *Id*. at 219.

95. *Id.* at 218-19 ("We have reached a contrary result where the employees were not represented by a union [. . . and] where union representation of employees was in doubt. Despite our allegiance to Draper the Board asks us to follow the rationale of *NLRB v. R.C. Can Co.* [citation omitted]. *R.C. Can* accepts the view that where minority activity supports the union's status or position, it is protected by section 7 notwithstanding any lack of union approval. A small group of employees wished to pressure the employer into speeding negotiations and accordingly stopped work to picket two entrances to the employer's plant. A union representative persuaded the men to abandon the picket line, but it was approximately two weeks before the employer took the men back on the job. The court enforced a Board order premised on the illegality of the discharge. The *R.C. Can* opinion reasoned that because the strikers supported the union, the employer did not have to choose between conflicting demands of the union and the employee group").

96. *Id*. at 219 ("[*R.C.*] *Can* accepts the view that where minority activity supports the union's status or position, it is protected by section 7 notwithstanding any lack of union approval").

97. *Id*. at 218 (citing Electromec Design and Dev. Co. v. N.L.R.B., 409 F.2d 631, 634 (9th Cir. 1969) and N.L.R.B. v. Globe Wireless, Ltd., 193 F.2d 748 (9 Cir. 1951) ("Globe Wireless"). The court at 219 also cites N.L.R.B. v. Buzza-Cardozo, which follows the basic holding of Globe Wireless but applied in the narrower context of when there is legitimate doubt about the union status of a group of workers. N.L.R.B. v. Buzza-Cardozo, 205 F.2d 889 (9th Cir. 1953).

98. N.L.R.B. v. Draper Corp., 145 F.2d 199 (4 Cir., 1944) (mentioned in *N.L.R.B. v. Tanner Motor Livery, Ltd*., 419 F.2d. at 219 ("despite our allegiance to Draper the Board asks us to follow the rationale of *N.L.R.B. v. R.C. Can Co.*") (internal citations omitted).

employees struck.[99] The union never officially approved the wildcat strike, but it also did not distance itself from the strike.[100] The employer discharged the striking employees. While the Board found the strikers' activity was protected under Section 7, the 4th Circuit disagreed, explaining that these workers had "*no right to take independent action to interfere with the course of bargaining* which is being carried on by the duly authorized bargaining agent chosen by the majority."[101] Despite the fact that the union never expressed any disagreement with the strikers, despite the fact that the workers commenced a strike in order to strengthen the union's bargaining position, the Fourth Circuit still held the activity was unprotected because the mere presence of another voice necessarily undermined the union's formal designation as the exclusive representative.

Tanner's ruling provided a recent ruling by a Circuit Court which made *Emporium Capwell* appear less of a divergence from lower court opinion. *Tanner*, although not cited, also provides some heartburn for Douglas's dissent in *Emporium Capwell* as he is forced to concede that "employees may reasonably be required to approach the union first, as a kind of 'exhaustion' requirement before resorting to economic protest."[102] While he argues that this requirement need not compel the workers to stay "under the continued inhibition when it becomes apparent that the union response is inadequate,"[103] the truth is that *Tanner* stood for a stronger proposition: that the workers' economic protest outside of formal union structures are unprotected, *even if* the union agrees with the activity.[104] While *Emporium Capwell* represents the highest judicial endorsement of a restrictive reading of §159(a), to some extent the walls supporting a more specifically anti-racist reading of the section were already crumbling with *Tanner*.

IV. WAYS TO THINK ABOUT WHAT A CBA IS

Emporium Capwell interprets the NLRA to highly prize the collective bargaining agreement's role in establishing the contours of the continuing bargaining relationship between employer and union. However, what is the Court's view on the essential nature of a CBA? The major case for this, *J.I. Case Co. v. NLRB*, establishes that collective bargaining agreements are a form of trade contract.[105] The employer makes an agreement with the union to purchase the labor power of its members on certain terms, and the contract between the employer and a worker represented by the union must adhere to

99. *Id.* at 201-02.
100. *Draper Corp.*, 145 F.2d 199, 201.
101. *Id.* at 203.
102. *Emporium Capwell Co.*, 420 U.S. at 72.
103. *Id*.
104. *Tanner*, 419 F.2d. at 218.
105. J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944).

the terms of the CBA.[106] *J.I. Case* builds upon earlier state court cases such as *Hudson v. Cincinatti Railroad*,[107] and the Court has reaffirmed the precedent in other contexts.[108]

This is not the only way to think of a CBA, and scholars for decades have noticed that CBAs have no direct correlate to traditional forms of contracts.[109] An alternative view, often referred to as the "agency view," construes the CBA as an agreement between an employer and a group of employees who act through the union as their agent.[110] The agreement can also be seen under a third-party beneficiary theory, wherein the agreement between a union and employer is created with the goal of benefiting the union's workers, a view consistent with an objective theory of contracts.[111]

However, it is the trade agreement view that won supreme judicial sanction through *J.I. Case*. It is perhaps telling that the dominant view of CBAs is one that foregrounds workers are in the business of selling their labor power in a capitalist mode of production. This view of the CBA would have certainly been a familiar one to Marx and Engels, as shown by Engels' description of trade unions as implying "the recognition of the fact that the supremacy of the bourgeoisie is based wholly upon the competition of the workers among themselves."[112] The trade agreement view of a CBA found in *J.I. Case* does not assume any sort of collective action and consciousness among the workers themselves, only that an agreement has been reached

106. *Id*.

107. Hudson v. Cincinnati, N.O. & T.P. Ry. Co., 152 Ky. 711 (1913).

108. *E.g.* Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), aff'd 348 U.S. 437 (1955).

109. *E.g.* Archibald Cox, *Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 2 (1959) (comparing the CBA to definitions of contract found in Corbin and other treatises); David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

110. An example of a case that interprets CBAs in this light is the Minnesota Supreme Court case *Mueller v. Chicago & N.W. Ry.*, 194 Minn. 83, 85 (1935).

111. For an example of this view, see the Oregon Supreme Court case *Springer v. Powder Power Tool Corp.*, 220 Or. 102 (1960), a view federal courts ascribe to Oregon state law as well, see *Roeder v. PacifiCorp Fin. Servs*., No. CV-05-1578-ST, 2006 U.S. Dist. LEXIS 79996, at *39 (D. Or. Oct. 27, 2006) ("Oregon subscribes to the objective theory of contracts.") (quoting *Springer v. Powder Power Tool Corp*., 348 P2d 1112, 1115-16 ("In determining whether a contract exists and what its terms are, [Oregon courts] examine the parties' objective manifestations of intent, as evidenced by their communications and acts")).

112. FREDERICK ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND (1892), *reprinted in* 4 MARX AND ENGELS COLLECTED WORKS, 1844-1845, at 295-583 (Eric Hobsbawm et al eds., 2010); *see also Id.* at 514 (Engels describes law and its enforcement as shaped in the image of the bourgeoisie: "True, the law is sacred to the bourgeois, for it is his own composition, enacted with his consent, and for his benefit and protection. He knows that, even if an individual law should injure him, the whole fabric protects his interests; and more than all, the sanctity of the law, the sacredness of order as established by the active will of one part of society, and the passive acceptance of the other, is the strongest support of his social position. Because the English bourgeois finds himself reproduced in his law, as he does in his God, the policeman's truncheon which, in a certain measure is his own club, has for him a wonderfully soothing power.") (emphasis added).

between the employer and an entity (the union) that essentially functions as a hiring hall for the employer. In contrast, the agency view and the third-party beneficiary view both assume an expectation of *collective* benefit for all workers in the union.

This trade agreement view of CBAs has drastic consequences for how union workers relate to the CBA. Under the agency view or third-party beneficiary view, courts could consider the CBA in a more objective light and conclude the aim of the CBA's provisions around the grievance procedures is to provide a regular and reliable avenue by which workers may obtain a redress from the employer. That would not make the CBA-provided procedure the only method by which the employee may seek a redress for their grievance, but it would be the one to which the employer would be contractually bound to respond. The other methods, such as picketing and urging a boycott, would be economic weaponry that the employer might try to resist if they think they can and which the union could use as additional pressure in the context of the grievance procedure itself. This more objective understanding of the CBA, and the union's role as exclusive representative, can be gleamed from the appeals court cases discussed above. Sadly, it is missing altogether in *Emporium Capwell*.

The absence is unfortunately glaring as the Court specifically addressed the provision for direct bargaining by workers in §9(a). Marshall explains that the provision is "to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of §8(a)(5)."[113] However, the NLRA "nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation."[114] This gloss on the petitioners' claims under §9(a)'s proviso underplays what really happened to these workers, as there is a large difference between "refusing to entertain such a presentation" and terminating workers after they persist in trying to make this presentation.

This line from Marshall closes an important opening for workers to organize effectively outside the confines of the collective bargaining agreement, and it is the victims of systemic discrimination who pay the price. However, we will see that it can get worse. A boss may be contractually required to respond to a grievance complaint over discrimination filed according to the CBA, but employers also must respond to judicial and EEOC proceedings over Title VII. However, the CBA can now deny a worker who has been discriminated against access to both judicial and agency remedies. It is now time to turn to *Emporium Capwell*'s spiritual successor: *14 Penn Plaza LLC v. Pyett*.

113. *Emporium Capwell Co.*, 420 U.S. at 61 n.12.

114. *Id. See* DEVELOPING LABOR LAW at §13.III.B.8 n. 491 (explaining the limited scope of this proviso and quoting *Emporium Capwell Co.* as its authority); *see also id*. at §III.B.3 (discussing interference with NLRA-protected rights).

V. 14 PENN PLAZA AS CULMINATION OF EMPORIUM CAPWELL

The facts and procedural history of *14 Penn Plaza* are relatively straightforward. Members of Service Employees International Union (SEIU), Local 32BJ are governed under a collective bargaining agreement that requires members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance resolution procedure.[115] This bargaining agreement was between the union and the Realty Advisory Board on Labor Relations, Inc, a multiemployer bargaining group for New York City real estate.[116] The union had consented to the employer hiring a unionized security company to provide security in the employer's lobby.[117] This made the lobby work of several workers unnecessary, and they were reassigned as night porters, which paid less.[118] The union supported the workers' grievance that alleged the reassignments were based on age, a violation of the Age Discrimination in Employment Act,[119] and this claim entered arbitration.[120] However, the union eventually withdrew its support for the age discrimination claim while it was still in arbitration, reasoning it could "not legitimately object to the reassignments as discriminatory" since it had supported the security contracting.[121] After this withdrawal but before the arbitration finished, the workers filed an age-discrimination claim with the EEOC. This claim was denied, leading to the workers filing suit in district court. This court denied the claims, explaining that the CBA's arbitration agreement could compel arbitration *in lieu* of a judicial remedy, noting that *Alexander v. Gardner-Denver* was in tension with the court's decision in *Gilmer*. After the court of appeals affirmed, the case was accepted by the Supreme Court.

115. *14 Penn Plaza*, 556 U.S. at 251. Section 30 of the CBA, which contains the arbitration clause, is titled "NO DISCRIMINATION" and reads as follows: "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." (App. to Pet. for Cert. 48a.1) (quoted in *14 Penn Plaza*, 556 U.S. at 252).

116. *Id*.

117. *Id*. at 252-253.

118. *Id*. at 253.

119. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §2, 81 Stat. 602, amended by 29 U.S.C. §621 et seq.

120. *14 Penn Plaza*, 556 U.S. at 253.

121. *Id*.

The opinion begins by noting that SEIU was the exclusive bargaining partner and bargained for a mandatory pre-dispute arbitration clause,[122] and this exclusivity becomes the tool by which the Court upholds the arbitration agreement. What is interesting is that Thomas seems to acknowledge that some forms of arbitration may be deleterious to the welfare of workers in how they rely on precedent. For instance, he quotes from the case *Gilmer v. Interstate/Johnson Lane Corp* that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"[123] The Court does not give any clues, however, on what exactly these potentially inappropriate claims would be or why they would be inappropriate. Instead, the Court punts and, again quoting *Gilmer*, held that "[i]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."[124]

Thomas' opinion also gives a full-throated defense of arbitration on discrimination claims, especially singling out for criticism a line of cases in the 1970s and 1980s that raised concerns about arbitration. The leading case for these concerns is the case Marshall relied on to assure litigants that the CBA would not cut them off from federal courts: *Alexander v. Gardner-Denver Co.*.[125] According to Thomas' opinion in *14 Penn Plaza*, the Court in *Gardner-Denver* argued that "an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights."[126] The Court in *Gardner-Denver* also described arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII,"[127] and it also raised worries about the informality of arbitration for effecting justice in discrimination claims.[128] The Court in *14 Penn Plaza*, however, will have none of these criticisms, explaining that "these misconceptions have been corrected."[129] The worry about the informality is addressed by saying that the informality of the proceedings is exactly why arbitration is preferred in many contexts, a practical advantage that elides the actual worry in *Gardner-Denver* about whether that informality will have a detrimental effect on the grievant receiving justice.[130]

The main event of *14 Penn Plaza*'s defense of arbitration is when it addresses a public policy concern expressed in *Gardner-Denver* over "the

122. *Id.* at 247.
123. *Id.* at 258, quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).
124. *14 Penn Plaza*, 556 U.S. at 258.
125. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (hereinafter Gardner-Denver).
126. *Id*. at 265 (citing *Gardner-Denver*, 415 U.S. at 51).
127. *Gardner-Denver*, 415 U.S. at 56. (quoted in *14 Penn Plaza*, 556 U.S. at 268).
128. *Id*.
129. *14 Penn Plaza*, 556 U.S. at 268.
130. *Id*.

union's exclusive control over the manner and extent to which an individual grievance is presented."[131] The court in *Gardner-Denver* explained that "the union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee."[132] However, none of these points hold any truck with Thomas, explaining the "the principle of majority rule" is "the central premise of the NLRA."[133] His cited authority? *Emporium Capwell*.[134]

Shortly afterwards, he cites the two cases Marshall relied on in *Emporium Capwell* that held majoritarian rule meant dissatisfaction for minority workers on some issues.[135] It is important to stress that *Emporium Capwell* was not related to whether an arbitration agreement was enforceable as a matter of public policy. Instead, it was about the extent to which workers could engage in concerted activity outside of the grievance process. *Emporium Capwell*'s argument, however, served as potent fuel for *14 Penn Plaza* because the Court presents a departure from the collective bargaining agreement's procedure as simply in contradiction with the principle of majority rule, even if the rank-and-file of the union itself supported the workers' concerted actions. The Court's majority reasoned that "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands."[136] This section ends with Thomas' Parthian shot, that workers pursuing discrimination claims outside of the mandatory pre-dispute arbitration "amounts to a collateral attack on the NLRA."[137]

Souter's dissent makes a crucial point about how drastically novel this case is. Except for the Fourth Circuit, every other Court of Appeals has held the FAA did not apply to CBAs, usually reasoning that the FAA (especially around civil rights) can only apply to individually-agreed upon employment contracts.[138] In contrast, a collective bargaining agreement is just that: collective. Because of this, almost every Circuit held the FAA's allowance

131. *Gardner-Denver,* 415 U.S. at 58, n.19.

132. *Id*.

133. *14 Penn Plaza*, 556 U.S. at 269.

134. *Id*., citing *Emporium Capwell Co.*, 420 U.S. at 62.

135. *14 Penn Plaza*, 556 U.S. at 271, (citing Ford Motor Co. Huffman, 345 U.S. 330, 338 ("The complete satisfaction of all who are represented is hardly to be expected) and Vaca v. Sipes, 386 U.S. 171, 177 (1967)). *Compare 14 Penn Plaza*, 556 U.S. at 271 with *Emporium Capwell Co.*, 420 U.S. at 62.

136. *Id.*

137. *14 Penn Plaza*, 556 U.S. at 271.

138. *Id*. at 281 (Souter, J., dissenting), (quoting *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.,* 199 F.3d 477, 484 (D.C. Cir. 1999) ("We see a clear rule of law emerging from Gardner-Denver and Gilmer [. . .] an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of Gardner-Denver after Gilmer, other than the Fourth, are in accord with this view.")).

for courts to mandate arbitration over civil rights claims through Section 3 of the Act did not apply to CBA arbitration clauses.[139] As Souter puts it, prior to *14 Penn Plaza*, Title VII claims "stand on plainly different ground from statutory rights related to collective activity" such as the right to strike or decertify a union.[140] This is because Title VII has nothing to do with principles of majoritarian self-governance but instead a guarantee to every individual of equal employment. These minimum substantive guarantees for individuals' rights, however, are subsumed under the union's right to form a trade contract with the employer. Stevens's dissent makes similar arguments on this point, arguing that the NLRA, FAA, and Title VII all have different aims in mind and that Congress did not intend for there to be methods where a worker may be stripped of their access to judicial remedies over civil rights abuses, even if that stripping comes from the provisions of a CBA.[141]

The Court in *14 Penn Plaza* intensifies *Emporium Capwell*'s restrictive reading of §159(a). The Court in *Emporium Capwell* acknowledged that it was possible to engage in concerted activity outside of the CBA but found the actions of the involved parties (refusing to engage in a process they considered flawed, picketing, and advocating a boycott) to have gone too far. That somewhat mixed opinion about concerted activity outside of the union-employer bargaining relationship is completely absent in *14 Penn Plaza*. Instead, *14 Penn Plaza* distills *Emporium Capwell* to advancing a highly ossified reading of the union's exclusivity. The CBA is exalted to an all-powerful, inescapable legal regime, and even availing oneself of public courts of law is rendered an attack on democratic governance and the NLRA itself. Without realizing it, Marshall's rejection of the more realistic and practical interpretation of "exclusive" provided by multiple circuits in cases such as *R.C. Can* and *Rubber Rolls* served as the precise argument Thomas needed to restrict the individual rights of workers. To extend the analogy in Douglas's dissent, if Marshall's opinion rendered workers prisoners of the union, then Thomas's opinion threw away the key.

VI. PRIVATE JUSTICE, PUBLIC LAWLESSNESS

What has been the price of this expansion of arbitration? From 1991 to 2024, there has been a veritable explosion in mandatory pre-dispute arbitration over discrimination claims, going from being present in only 2% of employment contracts to over 56%.[142] These arbitration agreements have

139. *Id*.

140. *Id*. at 282, quoting *Gardner-Denver* at 51.

141. *Id*. at 276 (Stevens, J., dissenting).

142. Katherine V.W. Stone, *Arbitration – From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, 73 LAB. L.J. 66, 66 (2022) (arbitration rates in the 1990s); Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI-KENT L. REV. 3, 20 (2019) (arbitration contract rates by the end of the 2010s); Ariana R. Levinson, *Expanding the*

also become much stronger than before, often times totally foreclosing the ability of a worker to pursue discrimination charges through federal courts. Instead, the worker must deal with an arbitrator and an arbitration decision that is remarkably unmoored from the procedural safeguards of the public judicial system.[143]

In some contexts, however, arbitration can be a benefit to workers, making arbitration a two-edged sword. Indeed, at first deference to labor arbitration was a historically necessary introduction by the Norris-LaGuardia Act to avoid restraint injunctions from reactionary and anti-worker federal judges.[144] Justice Douglas himself is responsible for the dominance of labor arbitration through his series of majority opinions in the "*Steelworkers* trilogy."[145] However, Douglas's opinions never discuss what is appropriate

Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act to Protect Workers' Rights, SSRN Scholarly Paper 3. (last updated June 20, 2023) https://papers.ssrn.com/abstract=4486077 (forthcoming in THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM, (Richard Bales & Jill Gross eds., 2024)).

143. In some contexts, this can be a benefit to workers, making arbitration a two-edged sword. Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490 (1959) (describing how arbitration is crucial for parties – like employer and employee – who are in a constant and interdependent relationship). United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596-597 (1960); *see also* United Parcel Service, Inc., 369 N.L.R.B. No. 1 (2019) (explaining that broad deference to arbitration decisions "realizes [the Board's] statutory duty, rather than abdicates it [. . .]."). In United Parcel Service, the Board returned to its holding in *Spielberg, Mfg. Co.* that it would defer to arbitral proceedings that "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and polices of the act." *Id*. (quoting *Spielberg, Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)) (emphasis added); accord International Harvester Co. 138 N.L.R.B. at 928 (deferral is called for if the award was not "at variance with settled law and therefore clearly repugnant to the purposes of the Act.").

144. 147 Stat. 70 (1932), codified as 29 U.S.C. §§ 101-15 (1988) ("Norris-LaGuardia Act") (from public policy declaration in §2: "*Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless* to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment [. . .] *it is necessary that* he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and *that he shall be free from the interference, restraint, or coercion of employers, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*; *therefore*, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.") (emphasis added).

145. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960) (in a CBA which delegates all grievances to arbitration, the court must defer to the arbitrator on the merits and equity of the grievance and even on whether the CBA has operative language to support the grievance); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (arbitration is the presumed place of resolution of all grievances under a CBA that includes an arbitration provision unless the CBA expressly excludes certain grievances from arbitration); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (Court has to defer to arbitrator's interpretation of the collective bargaining agreement, even if they would have construed the contract differently).

for labor arbitrators to rule on, only that when arbitrators do rule on something it is appropriate for them to receive wide deference.[146] His trilogy also centers on the collective bargaining agreement as the source of an arbitrator's authority, but what matters is the "essence" of the CBA's provisions and its purpose of increasing employee benefit.[147] 60 years later from the *Steelworkers* trilogy, this deference has become a scourge towards racialized and gendered workers and their vindication of Title VII rights, as shown by the fallout of *14 Penn Plaza*. This appears a powerful example of Derrick Bell's argument that the ossification of American legal innovations often leads to harm for Black workers.[148]

Earlier authors saw this danger in arbitration, that the privatization of justice could lead to the hollowing out of a common civil society altogether. In 1963, only three years after the *Steelworkers* trilogy, Heinrich Kronstein articulated this fear concisely:

> Arbitration is power, and courts are forbidden to look behind it. [. . .] In the face of the current trends in our society, the central concept of a social regime whose exclusive ordering is the totality of legislative and judicial mandates, has been weakened by the cession of segments of the law to organized arbitration.[149]

His description of arbitration as a privatized justice that poses an existential threat to any policy is motivated by the idea of an "essential lawlessness" that is constitutive of a "private government."[150] When labor arbitrators operate as absolute monarchs in their petty kingdoms, they have no significant fear of being overpowered by the courts. There is in fact some good evidence to suggest arbitrators often do make awards without any reliance on statute, even Title VII, making them *de facto* "lawless."[151] Under

146. *United Steelworkers of Am*., 363 U.S. at 564.

147. *United Steelworkers of Am*., 363 U.S. at 593.

148. Bell, *supra* note 18, at 369 ("As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the 'rule of law'—abstract principles lead to legal results that harm blacks and perpetuate their inferior status.").

149. Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 699-700 (1963).

150. *See* Heinrich Kronstein, *Business Arbitration-Instrument of Private Government*, 54 YALE L.J. 36, 66 (1944) ("[n]o theory in support of organized arbitration can conceal the essential 'lawlessness' of this form of 'private government.'").

151. The evidence is somewhat mixed. Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L. REV. 187 (2006) ("The empirical evidence on this point - which consists of case analyses, surveys of arbitrators, and reversal rates of arbitration awards and court decisions - is varied but ultimately inconclusive."). Some argue arbitrators mostly cite statute, *see* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 145-56 (2013). However, others have reached the opposite conclusion, that only a minority of arbitrators both to cite. See Ariana R. Levinson, Erin O'Hara O'Connor, & Paige Marta Skiba, *Predictability of Arbitrators' Reliance on External Authority?*, 69 AM. U.L. REV. 1827, 1881 (2020) (arguing labor arbitrators, in particular, do not cite statutory law in most cases).

the reign of arbitrators, civil wrongs (including violations of civil rights) are removed from the public light of the courts, de-politicizing the most political of all matters.[152] Again, this is not to imply arbitration is *all bad* in all civil rights and discrimination scenarios. For instance, an arbitrator could provide an award based on a highly progressive understanding of discrimination that runs far ahead of current jurisprudence and helps establish a common law of the shop against discrimination based on mutable attributes, so long as the reward is not repugnant to the aims of the NLRA.[153] This could happen with something like caste discrimination, which has virtually no judicial protection, though scholars have compellingly argued it is implied in Title VII, a view a progressive arbitrator could adopt with little fear of judicial override.[154]

However, the opposite could just as easily happen, and a reactionary arbitrator could do grave injustice to a strong claim of discrimination without any real avenue for redress. Unlike with caste discrimination, pre-dispute mandatory arbitration around racial discrimination brings with it a much greater opportunity cost, as a victim of racial discrimination not covered under the arbitration agreement could access a robust network of statute and precedent. This opportunity cost, in the case of sexual assault and harassment, proved enough to encourage legislative action in the form of the Ending Forced Arbitration of Sexual Assault and Harassment Act (EFASAHA) of 2022, which amended the FAA to make forced arbitration clauses over sexual offenses unenforceable.[155] However, no such legislation appears forthcoming when it comes to mandatory arbitration over racial discrimination.

152. Richard Freer, *Exodus from and Transformation of American Civil Litigation*, 65 (6) EMORY L.J. 1491-96 (2016); *see also* Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages - Where Is the State Action?*, 2007, J. DISP. RESOL. 417.

153. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. at 596-97; *see also* United Parcel Service, Inc., 309 N.L.R.B. No. 1 (2019). In *United Parcel Service*, the Board returned to its holding in *Spielberg, Mfg. Co*. that it would defer to arbitral proceedings that "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is *not clearly repugnant to the purposes and polices of the act.*" (*quoting* Spielberg, Mfg. Co., 112 N. L. R. B. 1082 (1955)) (emphasis added); *accord* International Harvester Co. 138 N.L.R.B. at 928 (deferral is called for if the award was not "at variance with settled law and therefore clearly repugnant to the purposes of the Act.").

154. Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV L. REV. F. 456 (2020), https://harvardlawreview.org/2021/06/title-vii-and-caste-discrimination/.

155. 9 U.S.C. §§ 401-402, especially § 402(a) ("Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute") (emphasis added); *see also* the earlier step of banning arbitration over hostile workplaces on the basis of sex with the Department of Defense Appropriations Act for Fiscal Year 2010 §8116, Pub. L. No. 111–118, 123 Stat. 3409 ("Franken Amendment,") (banning Department of Defense contracts over $1 million that contained mandatory arbitration of sexual assault and harassment cases).

VII. EMPORIUM CAPWELL TO 14 PENN PLAZA: COMMON GROUND FOR RADICAL LEGAL THEORIES

In surveying the interpretative twists and turns of NLRA §159(a), and especially its proviso for direct bargaining, some big conclusions emerge. The first lesson is that it is a case-study in how a theoretically rigid, practically unrealistic interpretation of a semantically indeterminate law can develop, an insight first made by the Realists that CRT, CLS, and LPE all stand in the wake of.[156] The second lesson is that understanding this path reveals a fertile common ground for these Realist-descended theories with an interpretative approach often seen as their foil, Marxism. I would like to spend the rest of this paper discussing the second lesson, starting with Critical Race Theory.

Critical Race Theory's historical origins are partially in response to the shortcomings of Critical Legal Studies (CLS).[157] In particular, CLS scholars often struggled to properly recognize the role of race in the development of legal doctrine and how this should affect our understanding of liberal rights discourse.[158] However, CLS and CRT both share a theoretical heritage with Legal Realism,[159] particularly the commitment to resisting a formalistic

156. G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 822-23 (1986) (citations omitted) ("[Realists were] devoted to exposing the incoherence of established patterns of reasoning in judicial decisions. By undermining the inexorability of such logic the Realists hoped to reveal the 'real' question in judicial decisions . . . The "real" question in liberty of contract cases was, therefore, not, "is there a liberty to contract in the due process clause?," but "do industrial workers in fact have no bargaining power to choose the terms of their employment?" This question was, the Realists believed, susceptible of empirical analysis).

157 Hutchinson, *supra* note 17, at 1192 ("While many CLS scholars sought to discard using the law as an instrument of progressive social change, Critical Race Theorists, recognizing the historical role that law has played in the advancement of the material and social status of persons of color, exhibited a commitment (in varying degrees) to the institution and structure of law [. . .] Critical Race Theorists asserted that the "whiteness" of CLS scholars prevented those writers from appreciating the value of law and rights discourse to persons of color. Although law is imperfect, it remains a vehicle for persons of color to demand justice and to represent the varied harms of racial subordination.").

158. *Id*. This is also a place where Marxist theory and Critical Race Theory can find common ground. Liberal rights discourse may prop up capital, but it was also an engine of the French Revolution and the abolition of slavery in both the UK and US (and France until its reversal under Napoleon). It is undialectical (and thus un-Marxist) to assume liberalism and capitalist property relations have only served reactionary ends. Afterall, it was liberalism, not socialism, that ignited Hobsbawm's "Age of Revolution." ERIC HOBSBAWN, THE AGE OF REVOLUTION: EUROPE 1789-1848 (1962).

159. Bell, *supra* note 18, at 366 ("The Realists stressed the function of law, however, rather than the abstract conceptualization of it. The Realists also had a profound impact by demonstrating the circularity of defining rights as "objective," which definition depended, in large part, on a distinction between formalistically bounded spheres between public and private.")

understanding of law that is divorced from material reality.[160] This resistance of the over-formalization of law is also the fundamental spart of Neo-realists and the Law & Political Economy movement.[161] For CLS scholars, formalistic orthodox obfuscates class interests, while for CRT theorists this formalism obscures racial dynamics, with the claim of "color-blindness" in the law as a quintessential example of this obfuscation.

However, *Emporium Capwell* is a good example of a case where all these schools are able to converge in their dissatisfaction around the formalism of labor law. In *Emporium Capwell,* the Supreme Court thought dissident struggles by workers over race necessarily undermined the union's status as the exclusive representative. Understanding "exclusive" in the NLRA to imply there can be no other voices besides the union when bargaining with the boss, or that the union represents some sort of legal monolith with no internally dissenting opinions, would appear to be the height of formalistic legal thinking divorced from practical reality.

Derrick Bell has even more to say about the path to *14 Penn Plaza* thanks to his theory of interest convergence. Bell employed the idea of interest convergence to understand how *Brown v. Board of Education* could galvanize strong support of civil rights by whites.[162] His theory is that, while there were indeed some sincerely committed white progressives, the bulk of white support can be explained by the idea of "interest convergence": whites supported Black equality post-*Brown* because Black and white interests momentarily converged.[163] There were a couple ways these interests converged. First, *Brown* helped America's international image, since one of the most effective lines of Soviet propaganda was that Jim Crow rendered American criticisms of Soviet repression laughably hypocritical.[164] Second, with Black veterans de-mobilizing and becoming painfully aware of the

160. *Id.* at 369 ("As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the 'rule of law'—abstract principles lead to legal results that harm blacks and perpetuate their inferior status."); on CLS' debt to Realism, *see* Samuel Moyn, "Reconstructing Critical Legal Studies," SSRN Scholarly Paper (updated February 23, 2024), at 24, https://doi.org/10.2139/ssrn.4531492, (forthcoming in 134 YALE L.J. (2024)) ("CLS attempted to reckon with the *underdeterminacy* of law's social functions and of law's interpretive stability in accounting for oppression—and drawing the consequences for seeking a way out. This contribution remains both its most misunderstood and most relevant legacy to a renewal of a social theory of law today.") (emphasis in original).

161. Moyn, *supra* note 160.

162. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93(3) HARV. L. REV. 518 (1980), https://doi.org/10.2307/1340546.

163. *Id*. at 522-23. ("Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after Brown, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

164. *Id*.

distance between American rhetoric about equality while fighting fascism and American reality of segregation at home, there was a highly unstable social situation that needed to be defused.

However, Bell provides a third reason for this convergence: the development of capital. He explains that "there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization in the South."[165] This can also help explain the NLRB and appellate court decisions of the late 60s and early 70s discussed above.

What to make of the road of *Emporium Capwell* to *14 Penn Plaza* under this theory of interest convergence? It is a demonstration of the contrapositive: when white interest does not converge with Black interest, whites cannot be relied on to support racial equality. At first, this interest divergence was not immediately obvious. Because there were robust legalistic means by which to address racial discrimination at the time *Emporium Capwell* was issued, the restriction of concerted activity outside the CBA was not seen as an especially drastic restriction (Douglas's dissent notwithstanding). However, the effect of this divergence becomes clear when we get to *14 Penn Plaza*. Judicial access to Title VII remedies for racial discrimination would most help Black workers, but the economic and practical benefits of labor arbitration helped white workers in both union leadership and the rank-and-file.

As discussed above, the Realists tried to transform formal legal questions into empirical questions about individuals subject to social forces. This basic theoretical move is one that Critical Race Theorists, Critical Legal Scholars, and Law & Political Economic analysts have in common. The question in *Emporium Capwell* can be similarly rephrased. Instead of wondering "How strictly should a union's statutory exclusive bargaining relationship with the employer be maintained?," it would be better to wonder, "Do workers have any ability to combat racial discrimination outside the four corners of the collective bargaining agreement?"

These theories decline to fully embrace Realism's indeterminacy thesis since they argue (in their own way) that law has plenty of determinacy. [166] In the case of CRT, law in the United States has often been drafted in view of

165. Bell, *supra* note 192, at 523.

166. Though there is a question of how much the most prominent Realists even truly endorsed some extreme indeterminacy, *see, e.g.,* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (arguing canons of construction often fail to provide determinative interpretations since each canon ("thrust") had a competing canon ("parry")). This is not the same as holding every interpretation is radically indeterminate.

shoring up white supremacy, and judicial precedents have carried that out.[167] Nevertheless, Legal Realism did get one thing right with indeterminacy: that there is an inherent contingency in the judicial system. At the end of the day, precedents are written by individual people. While they do so in a network of social forces beyond their making or control, they are still individuals with their own unpredictability. The Circuit cases studied in Section III show this well: within ten years, the law around §159(a) went from multiple appeals decisions embracing a fluid understanding to an 8-1 Supreme Court ruling decisively closing this way of thinking. If some of those appellate judges were Supreme Court Justices instead, would §159(a) be as restrictive as it is today? A Realist would urge us to believe it could have been different.

As Moyn points out, the Law and Political Economy attempts to square the circles of understanding law as a contingent entity that is still the product of determinable social forces.[168] Britton-Purdy, in his seminal article for LPE, argues that law has developed a "Twentieth-Century Synthesis" composed of two basic moves.[169] The first move was the reorientation of law around versions of economic "efficiency" that is focused on wealth maximization, typified by the Law & Economics movement, a reorientation that does not provide any way to understand the relationship between political and economic power.[170] The second move in the synthesis was the exclusion of questions of economic and structural forms of inequality in constitutional law, treating matters of race and sex discrimination in an individualized matter that assumes they are neatly separable from matters of class. Even from this description, the intersectional orientation of LPE is apparent, as is its Realist heritage. At the same time, this synthesis treats law as an "apolitical" matter that is most of all aimed at the advancement of capitalist wealth generation, a bourgeois conceit with which Marxism has great familiarity.[171]

While this synthesis has obtained much success, Britton-Purdy believes this success is fragile and breakable, just like its rise was breakable.[172] They point out that the institutional rise of Law and Economics come from the highly contingent event of a "rebellion against the New Deal that brought a small group of economists into the University of Chicago Law School."[173] If

167. Bell, *supra* note 18, at 369-71.

168. Moyn, *supra* note 160, at 31-35.

169. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 (6) YALE L.J. 1784, 1806-12 (2019).

170. Britton-Purdy et al., *supra* note 169, at 1809.

171. Indeed, the willingness of L&E proponents to define their legal approach explicitly in terms of supporting capital would have almost bemused Marx by its straightforwardness and gives new significance to thinking of libertarians as merely inverted Marxists. *See id.*

172. *Id.* at 1815-17.

173. *Id*. at 1815; *see also* STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 91 (2008) ("[The] organizational history of

Posner had not been appointed a federal judge, would law and economics be as dominant? Perhaps not, and that gives hope for combatting the racial capitalist synthesis.

LPE avoids theorizing too exactly about the determinable social forces, instead consciously adopting an intersectional understanding of these forces (in contrast to predecessors in CLS). This makes it a flexible and capacious framework in which to import more substantive radical theory. There is a logic to why § 159(a) of the NLRA took on the rigid interpretation it did, and there is a logic to how this interpretation came to hurt racialized workers most of all. What can unite both Legal Realist-inspired and Marxist-inspired legal theories under an LP umbrella is the belief that – despite the apparently ineluctable logic of the current white supremacist and capitalist legal superstructure – there is still a way out.

VIII. WHEN BELL MEETS ROBINSON: RACIAL-CAPITAL REALISM

This is where Robinson's theory of racial capitalism becomes relevant. As noticed above, Bell's interpretation of *Brown*'s legacy relied in part on the development of capital in the South, as desegregation would correct a highly inefficient mode of production that restricted the liquidity of labor power. However, while Black and white workers were joined back into the same labor market, Black workers still wound up working in much lower pay and more dangerous jobs in the South than whites tended to.[174] Even as white and Black interests converged, because white interests were driven by developing capitalism in the South (and winning a propaganda war with communism) this resulted in reproducing racial inequities in an even more capitalist system. Once white employers got the labor relations they wanted, institutional support to correct this racial component of capitalism similarly withered due to the possible economic disruption that may cause; that is to say, white interests diverged.

Robinson's concept of racial capitalism does not just seek to describe how capitalist class relations have taken on a racial dimension; it also helps to explain why the working class itself has often failed to establish itself as a unified front against capitalists. This is demonstrated in his discussion of Marx and Engels' analysis of the English working class and how M&E's examination sometimes failed to consider how the English working class was

law and economics, like so much of the modern conservative movement, begins with the University of Chicago").

174. Doug Parker, *Equity for Black workers: Continuing the Fight*, U.S. DEP'T OF LABOR BLOG (Feb. 29, 2024), https://blog.dol.gov/2024/02/29/equity-for-black-workers-continuing-the-fight (reporting from OSHA that Black workers suffer a workplace fatality rate 20% higher than white workers, partially due to operating in less white sectors such as transportation).

influenced by racial sentiment.[175] By seeing Irish workers as a racial other, the English working class cut itself off from forming a larger front against the boss.[176] This inability to see Irish workers as their allies, however, was founded on social divisions and attitudes that predated capitalist production and transmogrified to survive under capitalism.[177] The rulings of *Emporium Capwell* and *14 Penn Plaza* show how this divergence between racialized and non-racialized workers can occur. When the struggles of Black workers against discrimination outside the CBA are presented as necessarily at odds with democratic control of the union, this serves to make issues of discrimination appear as mere "special interests" that do not concern the rest of the union rank-and-file.[178] As a result, "real" issues of pay and workplace safety are presented as color-blind and universally relevant.

This divergence comes to a head with mandatory arbitration. On the one hand, it can save the union money and is procedurally less onerous than a court date, benefits that seem to universally apply to workers in the union. However, this arbitration can be the death knell for the possibility of a worker who was racially discriminated against to achieve justice. Robinson would perhaps even see the recent legislative prohibitions of mandatory arbitration for sex discrimination but not racial discrimination to be additional fuel for his theory of the specifically racial development of labor rights. Sexual discrimination primarily affects women, including white women. However, for Black women, there may be both sexual discrimination and racial discrimination at play,[179] but these interlocked discriminations are procedurally divided under the current framework. This worker would be able to fight the sexual harassment side of her complaint in court, while her racial discrimination case would have to play out in front of a private arbitrator. The white woman worker's discrimination has received an adequate legislative response to the holding of *14 Penn Plaza*, but the Black woman worker has not, an additional example of how American labor rights develop along racial lines.

While Robinson's theory is able to model how labor rights and labor relations developed along racialized lines, Robinson never claims that this

175. ROBINSON, *supra* note 15, at 39.

176. *Id*. at 41 ("Political and economic setbacks–on the one hand to English and Irish industrial workers, and on the other to Irish farmers, peasants, and industrial workers in Ireland–resulted in both an ideological and physical drifting apart of the two 'races.' From the mid-nineteenth century on, among English workers, the ideology of English nationalism gained ascendancy over the counter ideology of international class solidarity and socialist hopes. This was a part of a conservative reaction (trade unionism) to political defeat and economic growth, but it also had to do with the radical directions the Irish working classes (and the nationalist Irish middle class) had taken.").

177. *Id.* at 42.

178. *14 Penn Plaza*, 556 U.S. at 271. It is worthwhile to note how little the opinions of either *Emporium Capwell Co.* or *14 Penn Plaza* credit the support of rank-and-file workers.

179. Kimberlee Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics*, 1 UNIV. CHI. LEGAL F. 139 (1989).

has to be the way matters developed. LPE never claims law *must* develop this way either. In fact, Robinson begins his chapter on the English working class by quoting the historian E.P. Thompson that "class consciousness is the way in which the experiences are handled in cultural terms: embodied in traditions, value-systems, ideas and institutional forms. If the experience appears as determined, class consciousness does not."[180] Ultimately, Thompson concludes, "Class is defined by men as they live their own history, and, in the end, this is its only definition."[181] After relaying these quotations, Robinson explains that his own account will "hold Thomson to his word" by exploring how a product of European and American history (race) influenced class consciousness.[182] The racial dimension of capitalism's development in the United States is a fundamental fact that activists must reckon with, but these dimensions are not pre-ordained and can be overcome. Consider again the case of arbitration over sexual harassment. While the EFASAHA failed to fully grapple with the intersectional discrimination Black women workers face, there were other bills to ban forced arbitration in all workplace disputes including Title VII-related claims, such as the Forced Arbitration Injustice Repeal Act (FAIR Act).[183] The FAIR Act passed the House of Representatives under a Democratic Party majority in March 2022,[184] though it failed in the Senate. This political response to the sclerotic legal reasoning of *14 Penn Plaza* could have become law with slightly more support in the Senate.

Indeed, regarding legal-political contingencies, to some extent LPE is more profoundly Marxist than even many self-proclaimed Marxist theories. If Realism went too far in its embrace of indeterminacy, the danger is to embrace an overly deterministic view of law in reverse, a perspective that paralyzes political action and may inadvertently come to embrace some premises of much more conservative legal theories. A mixture is needed, understanding both how domination is baked into the law and how this domination is not unassailable. The NLRA was riddled with racist compromise, and §159(a) has been gutted to the detriment of racialized workers, but Black workers also remain the most unionized racial identity.[185]

Despite popular conceptions of Marx as embracing an almost mechanistic understanding of social development, Marx still highly valued the contingent in his explanations. What Marx cared about was humanity's

180. ROBINSON, *supra* note 15, at 30, quoting E. P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 9 (1968).

181. *Id*.

182. *Id*.

183. The FAIR Act has been introduced in several sessions of Congress: H.R. 1423, 116th Cong. (2019); S. 610, 116th Cong. (2019); H.R. 963, 117th Cong. (as passed by House, Mar. 17, 2022); H.R. 2953, 118th Cong. (2023). There was also the proposed Arbitration Fairness Act, which focused on banning forced arbitration of civil rights claims, *see* H.R. 1374, 115th Cong. (2017).

184. H.R. 963, 117th Cong. (as passed by House, Mar. 17, 2022).

185. Shierholz, Poydock, & McNicholas, *supra* note 65.

"situated freedom," our dialectical position as both beings capable of free choice and operating in a system larger than us with its own logic.[186] To be sure, this element can go missing in Marxian theories of law, something which led many theorists of Critical Legal Studies to take themselves as intrinsically opposed to Marxist theory.[187] This led to CLS scholars such as Duncan Kennedy overcorrecting Marxist determinacy by embracing a post-structuralism that denies the truth of any overarching legal theory,[188] creating further distance from Marxists.[189] This is unfortunate, since overall Özsu is right that a "sensitivity to contingency is not limited to Marx but is rather a distinctive feature of the Marxist tradition."[190] It is Marx, in the beginning of his articles on the very contingent events leading to Napoleon III, who explained that "Men make their own history, but they do not make it as they please."[191] In fact, even in his lifetime Engels lamented the overly deterministic bent attributed to his and Marx's theory and acknowledged it was to some extent their own fault due to their rhetorical positioning in the course of responding to critics.[192] While Marx and Engels still believed economic factors are the fundamental engine of human history, they still readily acknowledge that "the political ones, etc., and indeed even the traditions which haunt human minds also play a part."[193] Given these often

186. Moyn, *supra* note 160, at 32.

187. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1984) ("[C]ritical legal scholarship . . . is left-wing, yet it is deeply critical of Marxism."); *see also* Morton J. Horwitz, Mark Tushnet, *Legal Historian*, 90 GEO. L.J. 131, 134 and passim (2001) ("a distinctively Marxist theory of law has failed."); *but see* Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSAT'L LEGAL THEORY 622 (2014) (summarizing and critiquing the "standard account" of the relationship between CLS and Marxism).

188. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1689, 1712 (1976) (there is an "experience of unresolvable conflict among our *own* values and ways of understanding the world.").

189. DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 33-35 (1975/2006); Moyn, *supra* note 160, at 11-13; *see also* Umut Özsu, "The Necessity of Contingency: Method and Marxism in International Law", *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES, at 62 (Ingo Ventzke & Kevin Jon Heller eds. 2021) ("[CLS] did much to destabilise the hold of facile legalism in the minds of students, scholars, and activists, but its tendency to dispense with class analysis and fetishise doctrinal and adjudicative indeterminacy often had the effect of displacing specifically Marxist modes of examining law and legal reasoning under capitalism.").

190. Özsu, *supra* note 189, at 61.

191. KARL MARX, THE EIGHTEEN BRUMAIRE OF LOUIS BONAPARTE, *reprinted in* 11 MARX AND ENGELS COLLECTED WORKS, MARX & ENGELS 1851-53, at 103 (Hobsbawm et al, eds., 1973).

192. "Marx and I are ourselves partly to blame for the fact that the younger people sometimes lay more stress on the economic side than is due to it. We had to emphasize the main principle vis-à-vis our adversaries, who denied it, and we had not always the time, the place or the opportunity to allow the other elements involved in the interaction to come into their rights." Letter from Friedrich Engels to Joseph Bloch, 21-22 September 1890.

193. *Id*. A good example of a explicitly Marxist legal analysis that takes seriously the role of contingency and non-economic factors would be Ntina Tzouvala's analysis of the development of international law which argues that material forces only place a broad semantic boundary around law and that inside of that boundary other forces reign that render the law indeterminate. Ntina

underemphasized aspects, it seems to fair to say both CRT and Marxist theorists (including Robinson) would understandably blanch at the NLRB's decision in *Jubilee* that racial discrimination was not an unfair labor practice because the suppression of workers' rights were not "inevitable."[194]

CONCLUSION

This article began by considering a major labor law case, written by a giant of the civil rights era, that dramatically curtailed workers' concerted actions against racial discrimination. While Marshall believed he was preserving access to formal legal means to fight discrimination while defending the majoritarian government of unions, his reasoning eventually led to the former being consumed by the latter in *14 Penn Plaza* with a majority written by Marshall's successor: Clarence Thomas. This pathway provides a valuable example for analyzing how overly abstract legal principles and excessive emphasis on formal means divorced from a realistic understanding of how the law operates in practice can lead to the shoring up of racial capitalism. This article proposes that the Law & Political Economy movement can facilitate a fruitful exchange with Robinson and Bell to create a viable framework ("Racial Capital Realism") by which to understand this phenomenon in American law. Racial-capital realism soberly shows the extent of the challenge for those committed to labor rights and racial equality and is not fooled by the promise of merely formal legal means removed from practical reality. However, it still believes these challenges can be overcome, that the success of racial capitalism was as contingent as its defeat is, and legal interpretation is a vital battlefield for overcoming racial capitalism. To adapt Marx one more time: we make our own history and our own laws, but we make neither of them as we please.

Derrick Bell's "Racial Realism" is a bracing read that is unflinching about the dim prospects of obtaining racial equality in the United States, especially as he watched Civil Rights Era gains slowly curdle and diminish. However, he never dismissed the promise of struggle by Black workers. This hope without optimism is a critical aspect of Bell that is rarely emphasized, and it is what makes him a powerful ally for radicals.[195] It is Bell who writes,

Tzouvala, Capitalism as Civilisation: A History of International Law 16 (2020); *see also* Ntina Tzouvala, *International Law and (the Critique of) Political Economy*, 121 S. ATL. Q. 297 (2022).

194. *Jubilee Mfg. Co.*, 202 N.L.R.B. at 272-73 (1973).

195. Cornel West, *Ta-Nehisi Coates is the Neoliberal Face of the Black Freedom Struggle*, THE GUARDIAN (Dec. 17, 2017, 5:00 PM), https://perma.cc/5ZEG-QCDP (In contrasting Ta-Nehisi Coates' "apolitical pessimism" with Bell: "Coates wisely invokes the bleak worldview of the late great Derrick Bell. But Bell reveled in black fightback, rejoiced in black resistance and risked his life and career based on his love for black people and justice."); *see also* Darren Hutchinson *supra* note 17, at 1193 ("While Critical Race Theorists continue to unveil the malleability of law, the intractability of racism, and the socially constructed nature of race, they also offer doctrinal and policy reforms in a host of legal contexts.") (citing Patricia William, *Alchemical Notes:*

"We must realize, as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome."[196] Marx could not have said it better.

However, when it comes to contingent efforts against determined systems, this article will give Mrs. MacDonald the last word. One of the most moving passages of Racial Realism comes at the very end of the article as Bell recounts his interaction in 1964 with Biona MacDonald of Harmony, Mississippi, a poor Black community near the Delta. Harmony's Black residents were organizing to enforce a desegregation order. MacDonald was one of the organizers, and she had already been hit with the bludgeons of racial capitalism: her house was fired at; her son was fired from his job; and the bank tried to foreclose on her mortgage. When Bell asked her how she could keep going, she responded "Derrick, I am an old woman. I lives to harass white folks."[197]

Without recognizing Bell's reverence for Black struggle, even against the seemingly insurmountable barrier of white supremacist capitalism and its buttresses in the law, it becomes impossible to understand why Bell declares Mrs. MacDonald triumphant.[198] Bell's final line of his landmark essay says it all: if you remember her story, you will understand his message.[199]

Reconstructing Ideals From Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987) ("To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before.[. . .] We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round-but its opposite. This was the resurrection of life from 400-year-old ashes; the parthenogenesis of unfertilized hope.")).

196. Bell, *supra* note 18, at 378.

197. Bell, *supra* note 18, at 378.

198. *Id.* at 378-79.

199. This article's author would like to thank all the members of Professor Darren Hutchinson's Spring 2024 seminar on Critical Race Theory at Emory for their insightful discussion through the semester when this article was taking shape: Diamond Belgrave, Dana Brooks, Kiera Crandall, Brianna Cruz, LaShay Holmes, Prof. Hutchinson, Shyanne Kelly, Melanie Magwood, Xander Melnick, Sara Sacks, Emory Thompson, and Allison Williams.